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CHARLES ELMORE

UNITED STATES OF AMERICA

In the Supreme Court of the United States

OCTOBER TERM, 1929.

FRANK H. DOHANY,
Appellant,

vs.

FRANK F. ROGERS, State Highway Commissioner for the State of Michigan; the DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, a Michigan Corporation and the H. W. NELSON COMPANY of Chicago, Illinois, a foreign Corporation,
Appellees.

IN EQUITY
No. 338

STATEMENT PARTICULARLY DISCLOSING THE BASIS ON WHICH IT IS CONTENDED THIS COURT HAS JURISDICTION TO REVIEW ON APPEAL THE DECREE BELOW

FRANK H. DOHANY, *in pro per,*
Solicitor for Appellant.

Dated: August 29, 1929.

Business address:
1021-23 Hammond Building,
Detroit, Michigan.

CONWAY-SCOTT COMPANY, LAW PRINTERS, DETROIT, MICH.

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To the Honorable Justices of the Supreme Court of the United States:

STATEMENT PARTICULARLY DISCLOSING THE BASIS ON WHICH IT IS CONTENDED THIS COURT HAS JURISDICTION TO REVIEW ON APPEAL THE DECREE BELOW

(a) The Appellant (plaintiff in the Court below), filed a bill in the District Court of the United States for the Eastern District of Michigan, Southern Division, In Equity, praying for a decree or injunction to restrain Frank F. Rogers, the State Highway Commissioner for the State of Michigan, an administrative officer, from

further proceeding to judgment in an eminent domain proceeding instituted by himself in the Probate Court for Oakland County, Michigan, to condemn land belonging to plaintiff, to be traded to the defendant, the Detroit, Grand Haven & Milwaukee Railway Company for railroad purposes. The bill also prayed for an injunction against the defendants, Detroit, Grand Haven & Milwaukee Railway Company, a Michigan Corporation, and the H. W. Nelson Company, a foreign corporation, to restrain them from going upon the lands of plaintiff and committing a trespass, thereby causing irreparable injury to plaintiff's lands.

It was plaintiff's claim that the statutes under which the State Highway Commissioner instituted his condemnation proceedings and under which the defendants, Detroit, Grand Haven & Milwaukee Railway Company, and the H. W. Nelson Company, claimed the right to go upon and destroy plaintiff's lands, were unconstitutional and void, because they denied to the plaintiff the equal protection of the laws and deprived plaintiff of his property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States of America. District Clerk's Record, p. 15 (Sup. Ct. Record, p.....).

Plaintiff attacked Act 340 of the Public Acts of 1927; Act 215 of the Public Acts of 1925; Act 352 of the Public Acts of 1925 as amended by Act 92 of the Public Acts of 1927, of Michigan, or parts thereof, for the following reasons:

1. That Act 340 of the Public Acts of 1927, of Michigan, places plaintiff in an arbitrary, discriminate and unreasonable class not based on any proper difference for the purpose of classification; that it suspends the operation of the general railway

condemnation laws, as to plaintiff, and applies to his case special laws not applicable to all persons in similar circumstances; that it authorizes arbitrary selection and classification by an administrative officer of the State; that it authorizes the taking of plaintiff's property by the State of Michigan, for the purpose which is private, and not a public use, that purpose being to trade said property after it be acquired to the defendant, Detroit, Grand Haven & Milwaukee Railway Company for railway purposes; that it authorizes the taking of plaintiff's property in this instance, under the Highway Condemnation Act, to be used for railway purposes, thereby denying rights of procedure to plaintiff, and changing his measure of damages; that all of such provisions in Act 340 deny plaintiff the equal protection of the laws and deprive him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. District Clerk's Record, pp. 20-21 (Sup. Ct. Record, p.....).

2. That Act 215 of the Public Acts of 1925, of Michigan, places plaintiff in a class which is arbitrary, discriminate, and selective, and not based upon any reasonable difference which plaintiff bears to the general class of persons whose property is taken for railway purposes; that it allows and authorizes the State Highway Commissioner, an administrative officer, to arbitrarily select the mode of procedure to be used in condemning plaintiff's property; that it allows the operation of two or more general laws to be applied to any given case where property is taken under the provisions of the Act; that it allows the State High-

way Commissioner to arbitrarily select the statute under which he shall proceed to condemn plaintiff's property; that the statutes allowed as alternatives provide for different methods of procedure, and for different measures of damages; and that the State Highway Commissioner has adopted the statute providing for the most harsh procedure, and the smallest measure of damages, to be allowed plaintiff for the taking of his property; that all of such provisions deny to the plaintiff the equal protection of the laws and deprive him of his property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. District Clerk's Record, pp. 15-16 (Sup. Ct. Record, p.....).

3. That Act 352 of the Public Acts of 1925, as amended by Act 92 of the Public Acts of 1927, of Michigan, as applied in this case are discriminatory, unequal, and arbitrarily applied to the taking of plaintiff's property; that even though said statutes be fair upon their face, and constitutional if applied in the proper instance, that in this instance said statutes are applied in an arbitrary and discriminatory manner and the action of the State Highway Commissioner is unconstitutional, and that said statutes are being applied to this particular taking so as to deprive the plaintiff of his constitutional rights, both as to procedure and as to the measure of damages for the taking of his property; and that, therefore, said Acts in this instance deny to the plaintiff the equal protection of the laws and deprive him of his property without due process of law contrary to the provisions of the Fourteenth

Amendment to the Constitution of the United States. District Clerk's Record, pp. 21-26, (Sup. Ct. Record, p.....).

Plaintiff made application for an interlocutory injunction to restrain the defendants as aforesaid, pending a hearing on the merits. A temporary restraining order was issued, and the District Judge summoned a Circuit Judge and another District Judge to his aid, for the purpose of hearing an application for an interlocutory injunction, in compliance with Section 266 of the Judicial Code as amended. District Clerk's Record, p. 29 (Sup. Ct. Record, p.....).

Upon hearing the application for the interlocutory injunction, the District Court composed of the three Judges as aforesaid, denied plaintiff's claim for an interlocutory injunction, dissolved the temporary restraining order thereinbefore issued, and dismissed plaintiff's bill of complaint, all in the decree entered by the Court below, on the 25th day of June, A. D. 1929. District Clerk's Record, p. 112 (Sup. Ct. Record, p.....). Plaintiff below presented his application for the allowance of an appeal from said order, to the District Court, on the 24th day of July, A. D. 1929. District Clerk's Record, p. 123 (Sup. Ct. Record, p.....). This appeal was allowed and duly perfected.

The jurisdiction of the District Court below to entertain plaintiff's bill of complaint for the purposes herein stated is too well established to be questioned. *Ex Parte Young,* 209 U. S., 123; *Wells Fargo & Co. vs. Taylor,* 254 U. S., 175; *Hopkins vs. Clemson College,* 221 U. S., 637.

(b) The Supreme Court of the United States has jurisdicition to review on appeal an order by a District Court composed of three judges, granting or denying an interlocutory injunction, to suspend or restrain the operation of a state statute, because of its alleged unconstitutionality, and this Court has jurisdiction also to review the final decree made in a District Court composed of the three judges at the final hearing by virtue of Section 266 of the Judicial Code as amended.

This suit was instituted to suspend and restrain the enforcement, operation and execution of various statutes of the State of Michigan, by restraining the action of the State Highway Commissioner, the Detroit, Grand Haven & Milwaukee Railway Company, and the H. W. Nelson Company, in the enforcement or execution of the statutes and contracts made in accordance with and pursuant thereto, because such statutes were in conflict with the Fourteenth Amendment to the Constitution of the United States.

Appellant seeks a direct review by the Supreme Court of the United States, of the order and decree entered by the District Court as aforesaid, which reads as follows:

> "At a Session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournments at the District Court Room, in the City of Detroit, in said District, on Tuesday, the Twenty-fifth day of June, in the Year of Our Lord One Thousand Nine Hundred and Twenty-Nine.
>
> Present: The Honorable Arthur J. Tuttle,
> United States District Judge;
>
> The Honorable Charles C. Simons,
> United States District Judge;
>
> The Honorable Edward J. Moinet,
> United States District Judge.

FRANK H. DOHANY, vs. FRANK F. ROGERS, State Highway Commissioner, et al.	By: TUTTLE J. IN EQUITY No. 3118

"The Order to Show Cause heretofore issued herein, and Motion to dismiss Bill of Complaint, having been heretofore duly argued and submitted and the Court having taken time for mature deliberation thereon, and being fully advised in the premises, do now here Order, Adjudge, and Decree that the Restraining Order heretofore issued herein, be, and the same is hereby vacated and set aside, and Bill of Complaint dismissed, for reasons set forth in the written Opinion this day filed herein."

From that part of the Order and Decree denying the application for an interlocutory injunction after notice and hearing, appellant claims the right to a direct review by this Court by virute of the language of Section 266 of the Judicial Code as amended (U. S. C. Title 28, Sec. 380) which reads as follows:

"Appeal may be taken direct to the Supreme Court of the United States from an order granting or denying, after notice and hearing, an interlocutory injunction in such case."

From that part of the Order dismissing plaintiff's bill of complant which in fact was a final decree in the case, plaintiff also appeals by virtue of the right to such appeal given him by the further provisions of Section 266 of the Judicial Code as amended (U. S. C. Title 28, Sec. 380) which reads as follows:

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the District Court; and a direct appeal to the Supreme Court may be taken from the final decree granting or denying a permanent injunction in such suit."

By dismissing the bill of complaint, the Court entered a final decree in the case, and in so doing thereby denied a permanent injunction.

Appellant's right to a direct appeal to the Supreme Court of the United States from the decree of the District Court below is further made certain by Section 238 of the Judicial Code as amended (U. S. C. Title 28, Sec. 345). The language of this section applicable to the case at bar reads as follows:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in the following sections and not otherwise: (3) Section 380 of this Title (Sec. 266 of the Judicial Code as amended)."

(c) The appellant cites the following cases to sustain the jurisdiction of the Supreme Court of the United States to review the decree below, on direct appeal to this Court from the District Court: *Cumberland Telephone & Telegraph Co. vs. Louisiana Public Service Commission, et al,* 260 U. S., 212; *Interstate Busses Corporation vs. Blodgett, et al,* 276 U. S., 249; *Clark vs. Poor,* 274 U. S., 554.

(d) The Circuit Court of Appeals has no jurisdiction to review by appeal, a decree of the District Court, where there is a right to a direct appeal to the Supreme Court of the United States.

By dismissing the Bill of Complaint the District Court below made a final decision in the case. From that decision the right of appeal lies to the Supreme Court of the United States. Where such right of appeal exists, to that Court, there is no such right of appeal to the Circuit Court of Appeals, because of the provisions of the Judicial Code, Section 128 as amended (U. S. C. Title 28, Sec. 225) as follows:

> "(a) Review of final decisions. The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions:
>
> First: In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

U. S. C. Title 28, Section 345, hereinbefore quoted, gives the right to direct appeal to the Supreme Court in cases arising under the provisions of U. S. C. Title 28, Section 380, and direct appeal from a decree in a District Court to the Supreme Court is provided for therein. Therefore, the Circuit Court of Appeals has no jurisdiction to entertain an appeal in the case at bar. The only appeal to which the appellant herein is entitled is one direct to the Supreme Court of the United States.

For the reasons herein stated, the appellant prays that this Court take jurisdiction of the case on appeal, and determine the points therein raised as the ends of justice may require.

FRANK H. DOHANY, *in pro per,*
Solicitor for Appellant.

Dated: August 29, 1929.

Business address:
1021-23 Hammond Building,

APPELLANTS' BRIEF

FILE COPY

JAN 15 19
CHARLES ELMORE

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Appellees.

Brief of Appellant, Frank H. Dohany

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Brief of Appellant, Frank H. Dohany

I.

OPINION OF THE COURT BELOW

The opinion in the District Court of the United States for the Eastern District of Michigan, Southern Division, in this case, is reported in Dohany vs. Rogers, et al., 33 Fed. (2d), 918.

II.

JURISDICTION

Forty copies of a concise statement of the grounds on which the jurisdiction of this Court is invoked, have been filed with the Clerk of this Court in compliance with Paragraph 1, of Rule 12 of the Supreme Court Rules.

III.

STATEMENT OF THE CASE

After a series of negotiations between the Detroit, Grand Haven & Milwaukee Railway Company and the officers of the State of Michigan, an agreement was reached, wherein the State of Michigan bargained to procure by purchase or condemnation a strip of land 9.1 miles in length lying in Oakland County, Michigan, and to locate thereon the main line tracks and yards of the Appellee, Detroit, Grand Haven & Milwaukee Railway Company, lying between its Mile Posts No. 13 and No. 22.1, in consideration whereof the Detroit, Grand Haven & Milwaukee Railway Company agreed to surrender to the State its special charter—contract with the State, and to thereafter re-incorporate under the provisions of the general railroad laws of the State, and to become subject to the general tax laws of the State. Said railway company further agreed to surrender and deliver up to the State a portion of its railroad right of way 5¼ miles in length, lying adjacent to the Easterly side of State Trunk Line Highway U. S. No. 10, known as Woodward Avenue.

The Legislature passed Act 215 of the Public Acts of 1925 in order to allow the State to condemn property, through the State Highway Commissioner, to be traded by him to a railroad company, in cases similar to this.

The contract between the State of Michigan and the Detroit, Grand Haven & Milwaukee Railway Company as outlined above, was authorized by the State Legislature in Act 340 of the Public Acts of 1927, and a copy of the proposed contract, containing the terms and conditions was embodied in Section 10 of said Act 340.

Appellant is the owner of lands situated in Section 31, Troy Township, Oakland County, Michigan. On April 6th, A. D. 1928, the Appellant received a notice through the mail from Appellee Frank F. Rogers, State Highway Commissioner for the State of Michigan, to the effect that he proposed to condemn a strip of land three hundred (300) feet wide through the tract owned by Appellant, to be traded to the Appellee Detroit, Grand Haven & Milwaukee Railway Company to be used for railroad purposes in the building of tracks and yards, and that he was condemning Appellant's property by virtue of Act 340 of the Public Acts of 1927 of the State of Michigan, and that a hearing would be had in the City of Royal Oak, on April 14th, A. D. 1928 in pursuance thereto. Said notice also contained a description of the property sought to be obtained (R-3).

On the said 14th day of April, A. D. 1928, a hearing was had and proofs were taken, from which it appeared that the property of the Appellant was ¾ of a mile distant from Woodward Avenue, which it was sought to widen and improve. That said Appellee, Frank F. Rogers, also announced that the proceedings were had and conducted in conformity with the "Highway Condemnation Law," being Act 352 of the Public Acts of 1925 as amended by Act 92 of the Public Acts of 1927 of Michigan, and by authority of Act 215 of the Public Acts of 1925, rather than in conformity with the "Railway Condemnation Law," being Sections 8249 et seq. of the Compiled Laws of 1915 of Michigan; that said "Highway Condemnation Act" permits the allowance and awarding of damages to the owner only for land actually taken for highway purposes, and does not authorize the allowance of any consequential damages, or damages for a diminution of the value of the remainder of the tract of land from which said land for right of way purposes is taken (R-6).

The proofs adduced by said State Highway Commissioner further disclosed that the railroad yards and approximately twelve tracks would cross the land of the Appellant at an acute angle three hundred (300) feet wide and at an elevation of twelve (12) feet above the ground; that the yards adjoining the main tracks would be four thousand (4,000) feet in length, and would prevent the opening of any streets between said Woodward Avenue and the lands of Appellant lying Easterly of said tracks; that the only way of reaching said Woodward Avenue would be by way of either Maple Avenue or Clawson Road, which are the Northerly and Southerly boundaries of said Section 31, and are one mile apart; that the shutting off of approach to Appellant's lands from Woodward Avenue would greatly diminish its value, and retard its salability for residential purposes; that in the making up and breaking up of trains in said yards and in the passing and re-passing of trains on the main line tracks there would be a great quantity of smoke, cinders, dust, steam, noise and vibration and other damaging features to the surrounding territory (R-7).

On the 19th day of April, A. D. 1928, the Appellee, Frank F. Rogers proceeding in conformity with said "Highway Condemnation Law" filed his written Determination in which he found that it was necessary to take a strip of land three hundred (300) feet wide, consisting of 7.60 acres, through the tract owned by Appellant, and awarded Appellant Three Thousand Two Hundred Fifty ($3,250) Dollars per acre for the 7.60 acres of land taken from him, which was a nominal sum far under the true value, but made no award or offer of consequential damages for the depreciation in value of the remainder of the tract (R-7).

Appellant acquired said tract of land approximately fourteen (14) years ago with a view of retaining the same until the time would arrive when said property would become of value for residential subdivision purposes through the growth and development of the Cities of Detroit and Royal Oak, and the Village of Birmingham; and he has never received one cent of income from the property since he acquired it, but on the contrary has expended many thousands of dollars for taxes and improvements, and practically all of the surrounding and adjoining property has been platted and lots sold under restrictions for residential purposes. Many high class residences have been constructed on lands adjoining Appellant's, and he intended to plat and sell his property for the same purposes in the immediate future, but the residential utility will be wholly destroyed by the construction of the main line tracks and railroad yards of the Detroit, Grand Haven & Milwaukee Railway Company through his premises and the value of same will therefore be diminished to the extent of One Hundred Thousand ($100,000.00) Dollars and upwards (R-11).

Pursuant to the provisions of Section 6 of said "Highway Condemnation Act" said Appellee, Frank F. Rogers, immediately thereafter took possession, and claimed title to the 7.60 acres of Appellant's land, and together with the Appellee, Detroit, Grand Haven & Milwaukee Railway Company, entered into a contract with the Appellee, the H. W. Nelson Company of Chicago, Illinois, for the construction of said railway and railway yards, grading, road bed tracks, etc. and all of the Appellees since that time have been in control and possession of the property, and have cut standing timber thereon, and have been grading and building tracks and trestles thereon, and have been crossing and re-crossing the land of Appellant, all without

having made any award or offer of consequential damages, or damages for the diminution of the value to the remainder of the tract of Appellant's land, and before any payment of any kind was made to the Appellant for the taking of his property (R-11), (R-16).

Appellant filed his Bill of Complaint in the Court below (U. S. District Court for the Eastern District of Michigan, Southern Division) to restrain Frank F. Rogers and the Detroit, Grand Haven & Milwaukee Railway Company from further continuing with the proceedings in the Probate Court for Oakland County, Michigan, being File No. 23,548, to condemn his lands and to further restrain the trespass on his property by all of the aforesaid Appellees, it being Appellant's claim that his property is being taken and damaged in violation of his rights guaranteed by the Fourteenth Amendment to the Federal Constitution.

Appellant made application for an interlocutory injunction under 28 U. S. C., Ses. 380 (Judicial Code, Sec. 266 as amended), to remain in force until a hearing could be had on the merits of the case. A temporary restraining order was issued pending the hearing and determination of the application for the interlocutory injunction (R-22).

All of the Appellees moved to dismiss the Bill of Complaint, which motions were all brought on and heard by the three Judge statutory Court along with Appellant's application for the interlocutory injunction. At this hearing no testimony was taken. The Court held generally against Appellant's contentions raised in his Bill of Complaint, and an order was entered thereafter by District Judge Tuttle, one of the Judges who sat at the hearing. The order vacated and set aside the temporary restraining order formerly issued, failed to grant the interlocutory

injunction prayed for, and dismissed Appellant's Bill of Complaint.

Appellant now brings the case to this Court by direct appeal from the District Court by authority of the provisions of 28 U. S. C., Sec. 380.

CLAIMS OF APPELLANT

Appellant's claims, which are more fully discussed in the argument, may be divided into four general groups as follows:

1. That the three Judge statutory Court below had no jurisdiction to entertain Appellee's motion to dismiss the Bill of Complaint at the hearing on Appellant's application for an interlocutory injunction, and that the single District Judge entered the decree dismissing the Bill without the proper assent or authority from the other Judges.

2. That there is no underlying need or necessity for the State to take Appellant's property through the power of eminent domain, for the purpose of trading it for a railway company's charter and a strip of property along the highway three-fourths of a mile distant from the property which is being condemned (R-19).

3. That the taking of Appellant's property by the State solely for trading purposes, in compliance with a private contract entered into between the State and the Detroit, Grand Haven & Milwaukee Railway Company is not a taking for a public use, but is a taking for a private use, thereby depriving Appellant of his property without due process of law, and denying to him the equal protection of the laws (R-19).

4. That the statutory means and methods employed by the State, through its agents, to condemn Appellant's property, deprive him of his property without due process of law, and deny to him the equal protection of the laws, as more particularly hereinafter set forth (R-12 to 22 inclusive).

IV.

APPELLANT'S ASSIGNMENTS OF ERROR

1.

The Court erred in refusing to grant an interlocutory injunction pending a hearing on the merits of the case.

2.

The Court erred in its finding that plaintiff had not been deprived of his property without due process of law.

3.

The Court erred in its finding that plaintiff had not been denied the equal protection of the laws.

4.

The Court erred in dismissing plaintiff's bill of complaint.

5.

The Court erred in entertaining the defendants' motions to dismiss plaintiff's bill of complaint at the three judge statutory hearing, because the three judges comprising such tribunal were convened for the single purpose of granting or denying plaintiff's motion for an interlocutory injunction, and were without jurisdiction to hear such mo-

tions to dismiss or to enter a final decree dismissing plaintiff's bill of complaint.

6.

The Court erred in vacating the temporary restraining order theretofore issued in the case, there being no jurisdiction to dissolve such restraiining order.

7.

The Court erred in entering the order and decree dismissing plaintiff's bill, vacating the restraining order and refusing to grant plaintiff's application for an interlocutory injunction, because District Judge Tuttle was without jurisdiction to enter such order and decree, the three judges comprising the tribunal who heard plaintiff's motion for an interlocutory injunction having not evidenced their assent thereto by their signatures or by their announcement in open court with such three judges sitting and directing the tested order and decree.

8.

The Court erred in failing to find that Act 215, of the Public Acts of 1925, of Michigan, is void, because it denies to the plaintiff the equal protection of the laws and deprives him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

9.

The Court erred in failing to find that Act 340, of the Public Acts of 1927, of Michigan, is void, because it denies to the plaintiff the equal protection of the laws and deprives him of his property without due process of law,

contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

10.

The Court erred in failing to find that Act 352, of the Public Acts of 1925, as amended by, Act 92, of the Public Acts of 1927, of Michigan, is void because it denies to the plaintiff the equal protection of the laws and deprives him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

11.

The Court erred in failing to find that Section 2 of Act 215, of the Public Acts of 1925, of Michigan, was void, because it allowed the State Highway Commissioner to launch his condemnation proceedings in a highway condemnation tribunal instead of a railway condemnation tribunal, thereby depriving plaintiff of the equal access to the railway condemnation tribunal, as enjoyed by all others similarly situated, and thereby denying to the plaintiff the equal protection of the laws.

12.

The Court erred in failing to find that Section 2 of Act 215, of the Public Acts of 1925, of Michigan, specifically authorized the State Highway Commissioner to deny to the plaintiff the equal protection of the laws by allowing him to arbitrarily select either the general highway condemnation act, or the public corporation and state agencies condemnation act, under which to proceed to condemn plaintiff's property.

13.

The Court erred in failing to find that Section 2 of Act 215, of the Public Acts of 1925, of Michigan, allowed arbitrary selection and classification by a state administrative officer, thereby denying to plaintiff the equal protection of the laws.

14.

The Court erred in failing to find that Section 4 of Act 340, of the Public Acts of 1927, of Michigan, authorized the State Highway Commissioner to institute proceedings to condemn plaintiff's property in accordance with the general laws of the State, not designating which general condemnation law, but allowing the State Highway Commissioner to arbitrarily select the general law under which he desired to proceed, thereby denying to the plaintiff the equal protection of the laws.

15.

The Court erred in failing to find that, even though Act 352, of the laws of 1925, as amended by Act 92, of the laws of 1927, of Michigan, be fair on its face, and impartial in appearance yet, in this case, it is being applied and administered by the State Highway Commissioner, one of the defendants, with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between plaintiff and others in similar circumstances, that the proceedings under it are void, and that said defendant should be restrained from continuing such proceedings.

16.

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, allowed the State Highway Commissioner to arbitrarily discriminate against

plaintiff in invoking proceedings under any one of the many general condemnation laws of the state, thereby denying to plaintiff equal protection of the laws.

17.

The Court erred in its failure to find that, the action of the State Highway Commissioner denied plaintiff the equal protection of the laws by arbitrarily selecting the "highway condemnation statute," under which to institute proceedings, instead of the "railway condemnation act" or the public corporations and state agencies act.

18.

The Court erred in its failure to find that Section 2 of Act 215, of the Public Acts of 1925, of Michigan, specifically authorized the State Highway Commissioner to arbitrarily select as to whether he would invoke the liberal terms of the public corporations and state agencies act, or whether he would proceed under the stringent highway condemnation act, thereby allowing arbitrary selection in the enforcement of the laws, and denying plaintiff the equal protection of the laws.

19.

The Court erred in its failure to find that Section 4 of Act 340, of the Public Acts of 1927, of Michigan, authorized arbitrary selection, not based upon a finding or judicial determination, on the part of the State Highway Commissioner, in choosing a condemnation law, under which to proceed, thereby denying plaintiff the equal protection of the laws.

20.

The Court erred in its failure to find the method used by the State Highway Commissioner in carrying out the pro-

visions of Act 340, of the Public Acts of 1927, of Michigan, denied plaintiff the equal protection of the laws and deprived him of property without due process of law.

21.

The Court erred in its failure to find that a law authorizing arbitrary selection by an administrative officer in carrying out the laws, was void upon its face.

22.

The Court erred in its failure to find that one of the tests as to whether Section 2 of Act 215, of the Public Acts of 1925, of Michigan, denied plaintiff the equal protection of the laws, was whether or not the condemnation acts therein designated provided for different elements and measures of damages.

23.

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, set up no process of law, but allowed the highway commissioner to select any one of many condemnation processes, thereby denying plaintiff that equal protection of the law and the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution.

24.

The Court erred in its finding that Act 352, of the Public Acts of 1925, as amended by Act 92, of the Public Acts of 1927, of Michigan, prescribed procedure applicable to taking land to be used for railroad purposes.

25.

The Court erred in failing to find that if such highway acts provide such a taking of property for railway purposes, then there are two or more general laws applicable to such taking, each prescribing different procedure and each allowing different measures of damages contrary to the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

26.

The Court erred in its failure to find that when there are two or more laws applicable to the taking of private property for public use, each law providing for different processes, safeguards, privileges and immunities, and each law providing for a different measure of damages, and, that, when an administrative officer elects to proceed to condemn lands under the act allowing the fewest safeguards, privileges and immunities, and the smallest measure of damages, then such action denies the landowner the equal protection of the laws.

27.

The Court erred in its finding that the ultimate use to which the property was to be put was not the factor which should designate the type of condemnation proceedings, or the tribunal in which it should be launched.

28.

The Court erred in finding that the taking in this case, by the State, of private property, to be traded to another for railway purposes, and pursuant to a contract was a public use.

29.

The Court erred in its failure to find that the taking of the property for trading purposes was a taking of private property for a private use, thereby depriving plaintiff of his property without due process of law.

30.

The Court erred in its finding that the taking of private property by the State to be traded to a railway company, which railway company had the right to exercise the power of eminent domain within itself, was a taking for a public use.

31.

The Court erred in its finding that the taking of plaintiff's property upon which a railroad is to be located was a taking for public highway purposes.

32.

The Court erred in its finding that the re-location of the Grand Trunk railway tracks was so closely connected with the public highway project as to justify the taking of plaintiff's land under the highway act.

33.

The Court erred in its finding that it was necessary to re-locate the railway tracks by the State in any case; there being power in the railway company for that purpose.

34.

The Court erred in its finding that the taking of plaintiff's property under the highway act, by the State, for the purpose of trading such property to the railway com-

pany for railway purposes did not deprive plaintiff of his property without due process of law now deny him the equal protection of the laws.

35.

The Court erred in its finding that the re-location of the railway tracks was a part of the public highway project.

36.

The Court erred in its finding that this case was governed by the principles of law laid down in the case of *Brown vs. United States*, 263 U. S. 78.

37.

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, arbitrarily selected certain property owners from a general class, thereby denying them the equal protection of the general laws of the State of Michigan, contrary to the equality clause of the Fourteenth Amendment to our Federal Constitution.

38.

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, arbitrarily withdrew plaintiff from the general class of persons whose property is condemned for railway purposes, thereby denying him the equal protection of the laws.

39.

The Court erred in its finding that the State had authority to exercise its own discretion and judgment in adopting methods of the enforcement of the power of eminent

domain regardless of the general laws of the State. Such exercise of discretion being a denial to the plaintiff of the equal protection of the laws.

40.

The Court erred in its failure to find that the State of Michigan cast away its mantle of sovereignty, and became the agent of the railway company, when said State entered into a contract, thereby undertaking to acquire land upon which to relocate the tracks of said railway company, by purchase or condemnation, pursuant to Act 340, of the Public Acts of 1927, of Michigan.

41.

The Court erred in its failure to find that the State could not prescribe special laws to be used by it in taking private property for railway purposes, which laws were not applicable to all such proceedings to take property for railway purposes.

42.

The Court erred in its failure to find that the State, by depriving plaintiff of the right to demand a jury trial, which right is enjoyed by all others whose property is taken for railway purposes, thereby denied plaintiff the equal protection of the laws.

43.

The Court erred in its failure to find that the denying of attorney fees and expenses and right of general appeal to our Supreme Court to plaintiff, while allowing them to all other persons whose property is taken for railway purposes, denied plaintiff the equal protection of the laws.

44.

The Court erred in its failure to find that Section 4 of Act 340, of the Public Acts of 1927, of Michigan, legislatively declared the taking of plaintiff's property to be a public necessity, contrary to the Constitution and adjudicated cases of Michigan, thereby denying to the plaintiff the equal protection of those fundamental provisions enjoyed by all others whose property is taken for public use, contrary to the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

45.

The Court erred in its finding that plaintiff would receive that measure of compensation guaranteed by the equality clause of the Fourteenth Amendment to the Federal Constitution, although the benefits accruing by virtue of the public enterprise will be assessed and deducted from plaintiff's award, while in no other case under similar circumstances could such deduction of benefits from the award be made.

All of the assigned errors are intended to be urged and relied upon by Appellant.

V.

ARGUMENT

The Three Judge Statutory Court Below Had No Jurisdiction To Entertain Appellees' Motion To Dismiss

As stated before, Appellant made application in the Court below for an interlocutory injunction pending a hearing on the merits of the case. Appellees also brought on their motions to dismiss Appellant's Bill, and these mo-

tions were heard along with the application for the interlocutory injunction.

The Court, as composed, had jurisdiction only to pass upon the application for the interloctuory injunction. It was created for no other purpose. The statute (Judicial Code 266 as amended) authorizes this tribunal to hear and determine the application for the interlocutory injunction. No authority is given this tribunal to entertain, hear, or pass upon a motion to dismiss, brought on for hearing at the same time. This power is purely statutory, and must be strictly limited and construed.

In the case of *Crane vs. Johnson,* 233 Fed. 334 (1916) three Judges were called under Sec. 266 of the Code to pass upon the granting or withholding of an interlocutory injunction. A motion to dismiss was also made by the defendant. The Court refused to grant the interlocutory injunction, but at the same time it also declined to consider or pass upon the merits of the case after having refused to grant the injunction, and in so doing spoke as follows:

> "We do not understand that, upon such an application as the present, the Court, composed, under statutory requirements, of the District Judge, of another District Judge, and a Circuit Judge, is called upon, if indeed, authorized, to decide the merits of the suit."

Brown Drug Company vs. United States, 236 Fed. 603 was a case arising under Compiled Statutes 1913, Sec. 997, which are similar to Sec. 266 of the Code wherein a three Judge statutory Court was convened to hear a motion for an interlocutory injunction to enjoin interstate commerce rates. A motion was filed to dismiss Plaintiff's bill of complaint, and came on for hearing along with the motion for a temporary injunction. In refusing Defendant's motion to dismiss, the Court spoke as follows:

"A motion is made by the express companies to dismiss this case. This motion in my judgment, could not be heard before the three Judges now sitting. The three Judges are convened to hear the application for a temporary writ of injunction, not to determine whether the case should be dismissed upon its merits."

The Single District Judge Below Had No Authority To Enter A Decree

Sometime after the hearing was had on Appellant's application for the interlocutory injunction and Appellees' motions to dismiss, the District Judge, Tuttle, being one of the three Judges present at the hearing, entered the decree in this case below. It is signed by him alone, and does not purport to be authorized or sanctioned by either or both of the other two Judges who heard the case. The decree, of course, was not announced at any time in open Court. The learned Judge certainly exceeded his jurisdiction when he entered this decree.

In the case of *Cumberland Telephone & Telegraph Co. vs. Louisiana Public Service Commission, et al,* 260 U. S. 212 (1922) this Court had occasion to consider the jurisdiction of a District Judge to enter a decree or order in behalf of the three Judge statutory Court, after hearing. In that case, as in the case at bar, the three Judges had been convened to hear an application for an interlocutory injunction. Sometime after the hearing one of the District Judges who sat in the case, acting upon authority in the nature of a letter received from the Circuit Judge, entered an order granting a supersedeas. This Court, through Mr. Chief Justice Taft, spoke as follows in this regard:

"The letter was not an attempt by Judge Bryan to become a participant in the order. Nor is there

> any showing that Judge Clayton took part in the matter. A discussion in conference of the Judges as to the granting of an injunction pending an appeal before it was applied for does not supply what is needed to give efficacy to such order by a single Judge. *Compliance with the Statutes requires the assent of the three Judges given after the application is made, evidenced by their signatures or an announcement in open court, with three Judges sitting, followed by a formal order tested as they direct.*"

The decree below was not announced in open Court, was not signed by the three Judges participating at the hearing, and there is no showing in the record that the Court thus composed authorized or directed the single District Judge to enter a decree tested by himself. Appellant therefore submits that the Court below had no jurisdiction to dismiss his Bill of Complaint, and that the order dismissing it was entered without the proper authority.

Furthermore, the decree below entered by the District Judge stated that the "restraining order heretofore issued herein, be, and the same is hereby vacated and set aside." In *Cumberland Telephone & Telegraph Company vs. Louisiana Public Service Commission,* supra, the Court affirmed the rule that the District Judge had no jurisdiction to set aside a temporary restraining order granted before by himself in the case. The Court spoke as follows:

> "After a District Judge has granted a preliminary restraining order in such a case as provided, the same Judge could not set aside his own order; and such act by him was without jurisdiction."

The Court below was clearly in error in setting aside the temporary restraining order, as it had no jurisdiction for that purpose.

Appellant Has Been Deprived of His Property Without Due Process of Law, and Has Been Denied the Equal Protection of the Laws

The general purpose of the State in the taking of Appellant's land by eminent domain under the terms and provisions of Act 340 of the Public Acts of 1927 of Michigan is to turn said property over to the Detroit, Grand Haven & Milwaukee Railway Company for the purpose of the construction of a new railroad thereon. In the contract embodied in Act 340 the Railway Company has agreed to reimburse the State of Michigan for the money expended in the acquisition of the new railway right of way. The State of Michigan is acquiring the property by condemnation in the first instance, for the sole purpose of trading it to the Railway Company, pursuant to the contract. The State has no authority to operate a railroad, and in fact does not intend to do so. It is admitted that the State is not condemning the property for highway purposes. Appellant's property which is being taken is at least three-fourths of a mile from the highway sought to be widened, known as Woodward Avenue. It is very clear, therefore, that the State is procuring the property for neither highway nor railway purposes.

There is a "General Railway Condemnation Act" (C. L. 1915, Sec. 8249 et seq.) in force and effect in the State of Michigan through which any railroad company is empowered and authorized to condemn property for railway purposes. There is also a "General Highway Condemnation Act" which may be used by State officers when condemning property to be used for highway purposes. This act is known as the "Highway Condemnation Act" being Act 352 of the Public Acts of 1925 as amended by Act 92 of the Public Acts of 1927 of Michigan. These two con-

demnation laws provide for entirely different procedure to be used in the condemning of property, and also allow different measures of damages to be paid to the property owner for the property taken and damaged. There is also another general condemnation law which is known as the "Public Corporations and State Agencies Condemnation Act" being Sec. 353 of the C. L. of 1915 of Michigan. This latter Act is quite similar to the "Railway Condemnation Act" in the procedure authorized and the measure of damages allowed to the property owner. The "Railway Condemnation Act" and the "Public Corporations and State Agencies Act" provide for a liberal procedure on the part of the property owner, and allow him a much greater measure of damages than does the "Highway Condemnation Act."

In choosing the "Highway Condemnation Act" the State Highway Commissioner thereby deprived Appellant of procedural rights which he would have enjoyed, and deprived him of damages which he would have received if his property had been condemned in accordance with either the "Railway Condemnation Act" or the "Public Corporations and State Agencies Act." It is the Appellant's claim that in this way the State is infringing his constitutional rights guaranteed by Amendment Fourteen, Section 1, of the Federal Constitution, which reads as follows:

> "* * * Nor shall any State deprive any person, of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This clause means "that there can be no proceeding against life, liberty or property, which may result in the deprivation of any of these without the observance of

those general rules established in our system of jurisprudence for the security of private rights." *Hager vs. Reclamation District*, 111 U. S. 708.

Due process of law is secured by laws bearing on all alike, and not subjecting the individual to the arbitrary exercise of the powers of Government unrestrained by the established principles of private right and distributive justice. *Caldwell vs. Texas*, 137 U. S. 697; *Duncan vs. Missouri*, 152 U. S. 382. It has also been described as "the law of the land." *Hurtado vs. California*, 110 U. S. 535.

In addition to securing to every individual within the State, due process of law, the aforesaid provision goes a step farther and prohibits unequal discrimination by the States by declaring that no State shall deny to any person the equal protection of the laws. The extent and operation of this protective provision in our Constitution has been many times declared and applied. This Court had occasion to make exhaustive comment on the "equal protection" provision in the case of *Truax vs. Corrigan*, 257 U. S. 312. We quote the language of Mr. Chief Justice Taft from that case as follows:

> "The due process clause requires, that every man shall have the protection of his day in court, and the benefit of the general laws, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."
>
> "Our whole system of the law is predicated on the general fundamental principle of equality of application of the law."

"The equality clause of the 14th Amendment was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality on the other."

"It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

"Class legislation, discriminating against some and favoring others, is prohibited."

"And legislation, which is limited in its application and does not affect equally all persons similarly situated, is prohibited by the Amendment."

"The guaranty was intended to secure equality of protection not only for all but against all similarly situated."

"Immunity granted to a class however limited, having the effect to deprive another class however limited, of a personal or property right, is clearly a denial of equal protection of the laws."

"These provisions are universal in their application. The equal protection of the laws is a pledge of the protection of equal laws."

"Equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights."

"All persons should have like access to the courts of the country for the protection of their persons and property."

"The equality clause prescribes that the law have the attribute of equality of operation."

Arbitrary Classification

Act 215 of the Public Acts of 1925 of Michigan provides that whenever the line of any railroad or railway com-

pany is upon or adjacent to the right of way to a trunk line highway, the State Highway Commissioner in his discretion may condemn other property, and trade it to the railway company for the right of way property adjacent to the highway, after he has entered into a contract with the railway company for that purpose.

This provision certainly is discriminatory. Then there is Sec. 2 of the above Act which declares that the State Highway Commissioner shall proceed to condemn the property desired for trading purposes in accordance with the procedure prescribed for proceedings instituted by Boards of County Road Commissioners (which procedure is the present "Highway Condemnation Act"), or the procedure provided for condemnation by "State Agencies and Public Corporations," (being the "Public Corporations and State Agencies Act." Comp. Laws, 1915, Sec. 353, et seq.).

By operation of Act 215, a small group of owners, whose property the State desires to condemn for the purpose of trading it to a railway company for railway use, is arbitrarily withdrawn from the general class of persons whose property could be taken for railway purposes under the "Railway Condemnation Act". The owners within this group are denied all of the benefits, privileges and immunities guaranteed by the "Railway Condemnation Act", which all other owners enjoy under similar circumstances. The general class of owners, whose property is desired for railway use, is divided into two groups. The property is taken in either case for railway purposes. There is certainly no basis for such arbitrary and capricious classification as this. In *Truax vs. Corrigan, supra,* it was said:

> "Classification must be based upon a real and substantial distinction, bearing a reasonable and

just relation to the things in respect to which such classification is imposed, and classification cannot be arbitrarily made without any substantial basis."

The simple fact that the State Highway Commissioner has entered into a contract with a railroad company to procure certain lands by condemnation, and thereafter turn the lands over to the railway company on a trade, is certainly no reason for placing the owner of such property into an arbitrary, unreasonable and oppressed class. When the railroad is located upon Appellant's property, he will suffer exactly the same amount of damages and will be subjected to exactly the same degree of inconvenience as the person whose property is condemned, for the same purpose, under the "Railway Condemnation Act." Such an arbitrary designation of a small group of persons, including the appellant, furnishes no reasonable basis for the purpose of classification. It is Appellant's contention that the purpose for which the land is taken, and for which it is to be used, or in other words, the character of the use, should be the determining factor on the question of what tribunal should be resorted to, and what damages Appellant is entitled to receive as his just compensation.

In view of the fact that the land sought to be taken is to be used for a railway right of way and yards, the Appellant should be entitled to the procedure allowed by the terms of the "Railway Condemnation Act" in a tribunal created under that law and Appellant should be entitled to damages allowed under the "Railway Condemnation Act," which requires the payment of consequential damages for the diminution of the value to the remainder of the tract and it does not allow the deduction of benefits.

In a case similar to the one at bar, the Legislature of Indiana attempted to arbitrarily designate characteristics of a certain Chautauqua Company and to delegate to this Company the power of eminent domain. The law appeared to be general upon its face, but was so limited in its scope that only one Chautauqua Company had the certain designated characteristics, so as to fall within the scope of the Act. In the case of *Fountain Park Company vs. Hensler,* 199 Ind. 95, (1926), the Supreme Court of the State of Indiana condemned the aforesaid statute as unreasonable, selective, arbitrary, and in derogation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution. Upon the question of arbitrary designation in the matter of classification, the Court spoke as follows:

> "One of the essential requirements in order that the classification may not violate the constitutional guaranty as to equal protection of the laws, is that it must be reasonable, and natural, and not capricious or arbitrary."
>
> "The law requires something more than a mere designation of characteristics which will serve to divide into groups. Arbitrary selection or mere identification cannot be justified by calling it classification (citing cases) (p. 102)."

Act 215 of the Public Acts of 1925 is meant to apply to one single project, which is the one to take lands for trading purposes between the Cities of Detroit and Pontiac. In no other case has Act 215 ever been applied. It selects a small group of persons from the general class whose property may be condemned for railroad purposes, and applies to this small group special and arbitrary laws. Act 340 of the Public Acts of 1927 was passed in conformity with Act 215 and circumscribed the few individuals

to be placed within the small group, and provided for the condemnation of their property in a special manner, and further provided for the trading and conveyance of the property to the Detroit, Grand Haven & Milwaukee Railway Company.

There is no contention that Act 340 of the Public Acts of 1927 is intended to apply throughout the State generally. It is admitted that its scope of application is pinned down to Appelant and a few other persons in the class with him.

Section 4 of Act 340 authorizes the taking of lands which are described in the contract, and authorizes the State Highway Commissioner to acquire the land on behalf of the State Highway Commissioner to acquire the land on behalf of the State by purchase or condemnation "in accordance with the general laws of the State of Michigan." The State Highway Commissioner proceeded with the condemnation of Appellant's property in accordance with Act 215 of the Public Acts of 1925, which the Highway Commissioner contends is a "general law of the State of Michigan."

It was said in *Fountain Park Company vs. Hensler, supra*:

> "A proper classification must embrace all who naturally belong to the class—all who possess a common disability, attribute, or qualification, and there must be some natural and substantial difference germane to the subject and purposes of the legislation between those within the class included and those whom it leaves untouched."

The State has attempted to condemn property to be eventually used for 9½ miles of railway right of way, under special laws which apply to no other person or

group of persons within the State. Applying the above rule, we find that there is no natural or substantial difference between Appelant, whose property will be taken and used for railway purposes, and all other persons within the State who enjoy the terms of the "Railway Condemnation Act" and whose property may be taken to be used for railway purposes. If the Railway Company should desire to extend its railway right of way, it would be required to employ the "Railway Condemnation Act." In such a case property owners in exactly the same situation as Appellant, and whose property was desired to be used for exactly the same purpose, would be entitled to a more favorable procedure and a greater amount of compensation than Appellant is getting in this case.

In *Connolly vs. Sewer Pipe Company,* 184 U. S. 540, the Court said:

> "Due process of law and the equal protection of the laws, this Court has said, are secured if the laws operate on all alike, and do not subject the individual to any arbitrary exercise of the powers of government."

In *Southern Railway Company vs. Greene,* 216 U. S. 400, it was said:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation" (p. 412).

In the case at bar, it will be seen that the real purpose of Act 340 of the Public Acts of 1927 is to withdraw Appellant from the operation of the general laws, and to place him under special laws.

In *Atchinson, etc. Railway Company vs. Vosburg,* 238 U. S. 56, the Kansas Statute bestowed upon a shipper,

rights which were not bestowed upon a railway. In declaring the Act void, the Court spoke as follows:

> "The Act, while recognizing the existence of such burden allows compensation for it in favor of one class of litigants, but does not allow like compensation to the other class when subjected to like burden. This in our opinion is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment" (p. 61).

The "Railway Condemnation Act" recognizes that greater burdens exist, when property is taken for railroad purposes, than when it is taken for highway purposes, and makes adequate provisions for these additional burdens. Act 340 attempts to withdraw these provisions from Appellant, by allowing his property to be taken under the provisions of the "Highway Condemnation Act" and thereby denies to him the equal protection of the laws.

Appellant submits, therefore, that the Court below was in error when it found that the classification affecting Appellant did not deny to him the equal protection of the laws (33 Fed. 2d 920).

In the case of *Cotting vs. Kansas City Stock Yards Company*, 183 U. S. 79, it is found that the State of Kansas passed a law regulating the charges of stockyards companies having a volume of business of $100,000.00 or more, and upon the number of head of live stock handled in a day. The limitation was made in such a manner as to apply to only the Kansas City Stock Yards Company. Holding that the statute denied to the Company the equal protection of the laws, the Court spoke as follows:

> "In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered, but simply on

> the amount of business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes and which is perfectly reasonable so far as the value of the services rendered to the individual seeking them is concerned, yet if by aggregation of business he is compelled to make large profits his charges may be cut down. * * * We must, nevertheless always remember that the equal protection of the laws is guaranteed and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast on the other."

The Statute was held unconstitutional.

Two or More Laws Applicable to the Same Subject Matter Under the Same Conditions

The Railway Condemnation law is applicable generally throughout the State when property is taken for railway purposes. There is no question but what that law could be applied properly for the taking of Appellant's property to be eventually used for railway purposes. Act 340, however, was passed thereby authorizing the application of Act 215 of the Public Acts of 1925 to the taking of Appellant's property, and thereby authorizing the State Highway Commissioner at his discretion to apply to the taking of Appellant's property the "Highway Condemnation Act," or the "Public Corporations and State Agencies Condemnation Act." This action by the State placed Appellant in a class whose property could be condemned by any one of the three aforesaid Condemnation laws, and in this way made three entirely different Acts applicable to the same taking, and the State Highway Commissioner chose to proceed in accordance with the "Highway Condemnation Act."

There is certainly no standard whereby due process of law may be measured in a condition like this. One process may be applied to one taking, another process may be applied in condemning other property, and still another process is available for the same kind of a taking, all under the same conditions. The State has deprived Appellant of that due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

In the case of *ex parte sizemore,* 8 S. W. 2d 134 (1928 Texas) the Court discussed the effect of two or more statutes applicable to any given case. There was a general road law operating throughout the state providing that a convict should be entitled to three dollars credit per day upon his sentence for work performed on the County Road. A local County Road Law was passed providing that in a certain County a convict should receive only fifty cents per day credit for his work. The Court used the following language in holding the statute void:

> "A law which makes different punishment follow the same identical criminal acts in the different political subdivisions of Texas violates both our State and Federal Constitutions. It fails to accord equal rights and equal protection of the law, and a conviction under it is not in due course of the law of the land."

Act 340 of the Public Acts of 1927 provides for the payment of a lesser amount of damages to Appellant whose property will undergo the same use as that taken from other persons by condemnation under the provisions of the "Railway Condemnation Act."

In the case of *Anderton vs. City of Milwaukee,* 82 Wis. 279, the Court considered a charter provision of the City

which provided that throughout the City generally land owners would be compensated for damages caused by change of grade by the City along streets adjacent to their property. One provision of the charter excepted an area of land comprising forty-nine blocks from the general provision, and denied to the persons within the forty-nine blocks the right to damages caused by change of grade. In condemning the discrimination against certain owners in the excepted area the Court spoke as follows:

> "If the Legislature had the power thus to take away from the lot owners in 49 particular blocks of the City, such right of property so permanently secured to them by the charter, and at the same time leave such charter rights unimpaired as to all other lot owners in the City, then the Legislature has the same power as to the lot owners in a single block or even as to the owner of a single lot in a single block. It is one of the purposes of the American constitutional law to prevent all such class legislation" (p. 284).
>
> "It attempts to make an arbitrary classification and distinction, in regard to such an established grade, between lots similarly situated and subject to the same or substantially the same conditions. This is certainly in violation of the constitutional provision quoted" (Equality Clause) (p. 285).

By the same token, it is just as discriminatory for the State Legislature to pick out a certain group of persons, including Appellant, between the Cities of Detroit and Pontiac, and apply to them special laws, as it would be if the Legislature segregated a single individual and attempted to deny to him privileges enjoyed by all other persons within the State.

In *Pearson vs. City of Portland*, 89 Me., 278, the Court had occasion to consider the constitutionality of a statute

which provided that a non-resident person who was injured by the negligence of another could recover only by showing the right to recover under the laws of his native State. There was a general law in effect in the State which allowed recovery in negligence cases. Holding that the statute denied to the non-resident the equal protection of the laws, the Court spoke as follows:

> "The general statute may undoubtedly be repealed; but the Court is of opinion that while it remains in force for the protection of one class of persons within the jurisdiction of the State, it must remain in force for the protection of all others similarly situated."

Appellant contends that as long as the "Railway Condemnation Act" remains un-repealed, its protection must remain in force for the protection of all persons whose property is being condemned for railway purposes. The Court below was in error when it ignored the aforesaid claim of Appellant.

Procedural Rights Which Have Been Denied To Appellant

The District Court below was of opinion that Appellant had no vested rights in procedural matters and therefore his rights of that nature were not protected by the equality clause of the Fourteenth Amendment. That has been the contention of the Appellees from the beginning of this case. It is obvious that the State Legislature may change or repeal the statutes regulating matters of procedure. It is Appellant's contention, however, that the State cannot repeal or nullify procedural rights as to some persons, while at the same time leaving these rights of procedure in full force and effect as to all other persons within the

State under the same or similar circumstances. In other words, Appellant claims that as long as the general procedural statutes of the "Railway Condemnation Act" remain un-repealed, that he should be entitled to access to them the same as all other persons within the State whose property is being condemned for railway purposes.

It was firmly established in the case of *Truax vs. Corrigan*, 257 U. S. 312, that where there is a right given to one to redress his wrongs, it must also be given equally to all other persons in the same circumstances. In that case it was held that the denial of equity procedure to a certain limited class was offensive to the equality clause of the Fourteenth Amendment.

In the late case of *Power Manufacturing Company vs. Saunders*, 274 U. S. 490 (1926), the Court had occasion to consider an Arkansas statute which denied procedural rights to foreign corporations doing business within the State. In that case it was contended that as to procedural matters there was no vested right and the State could use discrimination in granting such rights to some while withholding them from others. Condemning the statute as discriminatory, and violative of the equality clause, this Court spoke as follows:

> "It, of course, rests with the State to prescribe the venue of actions brought in her Courts. But, the exercise of this power as of all others, must be in keeping with the limitations which the Constitution of the United States places on State action. *Procedural statutes are not excepted, but must fall like others when in conflict with those limitations.* This is illustrated in a recent case where a statute of Arizona forbidding the granting of injunctions in certain situations was held to be in conflict with the equal protection clause of the Fourteenth Amendment, and invalid, notwithstanding a con-

tention that it was merely a procedural provision excluding a particular remedy in equity, but leaving remedies at law open. *Truax vs. Corrigan, supra,* pp. 322-330. Further illustration is found in a still later case where a Wisconsin statute subjecting foreign corporations to a burdensome procedural requirement not laid on other litigants was pronounced invalid under the same constitutional provision, *Kentucky Finance Corporation vs. Paramount Auto Exchange Corporation,* 262 U. S., 544."

There are many procedural rights under the "Railway Condemnation Act" which Appellant has been denied, by operation of Act 340 of the Public Acts of 1927, and Act 215 of the Public Acts of 1925, which acts authorize the condemnation of this property under the Highway Condemnation Act.

A contrast of the procedural rights (allowed to all other persons excepting Appellant) under the "Railway Condemnation Act" and rights allowed under the "Highway Condemnation Act" will be considered here.

1. *Jury Trial*—The "Railway Condemnation Act" (C. L. 1915, Sec. 8254) provides that when property is condemned for railway purposes the land owner may demand a jury trial in the Circuit Court. Under those conditions a Judge is present, whose duty it is to rule upon evidence and instruct the Jury as to the law of the case (C. L. 8255). It is the duty of the Jury to pass upon and determine both the question of the necessity for the taking, and to determine the amount of damages to be paid. The Respondent in the case has the right to challenge and excuse jurors making up the tribunal and of course conduct a voiredire examination of the jurors.

Under the "Highway Condemnation Act" (Act 352 of the Public Acts of 1925 as amended by Act 92 of the Public Acts of 1927) the State Highway Commissioner, who is the petitioner and one of the parties to the action, is empowered to conduct a hearing and to himself determine as to whether or not there is a necessity for the taking of the property (Sec. 4). After he has filed his determination of necessity, he then proceeds to file a Petition in the Probate Court for the appointment of three Commissioners whose duty it is to pass upon the amount of damages to be paid to the property owner. These Commissioners then proceed in ignorance of the rules of evidence and without the guidance of a Court or judicial officer to inform them of the elements to be considered in arriving at a proper award. A fair sample of the injustice inflicted upon property owners where their property was taken under the "Highway Condemnation Act" may be found by a review of *Rogers vs. Breisacher,* 231 Mich. 317; *Rogers vs. Vermander,* 242 Mich. 239; *Rogers vs. Boelter,* 242 Mich. 520.

The Probate Judge who instructs the Jury under the "Highway Condemnation Act" many times is not a lawyer, but his ruling upon the evidence is final. The Commissioners are judges of both the law and the facts of the case.

2. *Effort to Purchase*—Sec. 8249 of the "Railway Condemnation Act" requires that a bona fide effort to purchase the property before proceedings to condemn are started, without which the Court has no jurisdiction to proceed further.

Under Sec. 4 of the "Highway Condemnation Act" the declaration of the Commissioner that he

has been unable to agree with the owner, for the purchase of such property, and his determination of the necessity of the project and of taking the particular property described therefor, shall not thereafter be questioned.

3. *Vesting of Title*—Sec. 8249 of the "Railway Condemnation Act" provides that the award of compensation, damages, and a reasonable attorney fee shall be paid or deposited "before such Company shall have any right to enter upon or take possession of the lands condemned".

Sec. 6 of the "Highway Condemnation Act" provides that: "Upon the filing of such determination of necessity and the giving of notice * * * the title, and the right of possession to all of the property and property rights described in the determination shall vest in the State * * * for the purpose therein stated, * * * The Commissioner shall have full power and it shall be his duty to enter upon the premises with such aid and assistance as shall be necessary and remove such fence or fences, obstructions or encroachments without delay."

Appellant will be precluded from receiving attorney fees, witness fees, and other costs and disbursements because there is no provision in the "Highway Condemnation Act" for the allowance thereof, and the tribunal has no jurisdiction to award any amount for those items.

4. *Right of Appeal*—Sec. 8257 of the "Railway Condemnation Act" provides that either party who is aggrieved with the award of compensation may appeal to the Supreme Court of Michigan. Upon

such appeal the Sureme Court considers the case de novo upon both the law and the facts and renders a judgment accordingly.

The "Highway Condemnation Act" (Sec. 27) provides that a review upon the Determination of Necessity filed by the State Highway Commissioner shall be by certiorari within ten days after it is filed. Statutory certiorari is the only means of review which the land owner has to review the award of compensation. In such a proceeding as provided in either case, the Supreme Court is limited in its consideration to the regularity of the proceedings and regardless of how little the amount of damages awarded may be, the Court cannot disturb the judgment below if the proceedings were regular.

Our Supreme Court has spoken often of the importance of trial by jury in condemnation cases. An important expression of the Court's sentiment on this subject is as follows:

> "The change was made from a well founded belief, founded on experience, that private property was often taken improperly and without any necessity, and that the pretense of public utility was often a cloak for private aggrandizement. Ways were forced through private property to enrich the owners of other property, who were enabled by intrigues and sinister influence to induce municipal bodies to use the public authority to subserve their private schemes. The system was abused to the oppression of individuals by corruption and bargaining, and the sacredness of private property, and its immunity from any interference not required by actual public exigencies, ceased to be respected.

> The Constitution has changed this by requiring the whole subject to be determined by a jury of freeholders; so that each case shall be determined by a separate tribunal summoned expressly for the purpose, who must be unanimous in their views before any land can be taken; who must act openly and before all concerned, in hearing and receiving testimony; who cannot listen to private persuasion, and where any attempt to influence them will subject the offender to severe and disgraceful punishment. All these safeguards are implied in the use of the term 'jury'; and can be maintained, if any of these securities are impaired or disregarded. The functions of juries and the requisites of legislation in these cases have been passed upon frequently." See cases cited, page 114. *Paul vs. Detroit,* 32 Mich., page 108.

In Sec. 4 of Act 340 of the Public Acts of 1927, the Legislature went so far as to itself determine the necessity for the taking of Appellant's lands in the following language:

> "The changes and improvements contemplated by this Act and the said proposed contract, and the taking of the lands described in said contract, for the new right of way of said Railroad Company, including the additional lands described therein necessary for depot and yard purposes at Birmingham, and all other lands necessary or required to carry out this Act, and said proposed contract, are hereby declared to be a public necessity * * *."

Article 13, Sec. 1, 2 and 3 of the Constitution of Michigan of 1908, requires that in every case where private property is taken for public use, the necessity therefor shall be determined in a judicial proceeding, which requires due process of law. This is the uniform interpretation placed upon the provisions by the Court. In the case

of *Hendershott vs. Rogers,* 237 Mich. 344, interpreting the words added to the Constitution, the Court spoke as follows:

> "They (the makers of our later Constitution) added the words to make necessity, like compensation, a judicial question, in respect of which there should be due process of law, notice thereof to the land owner, hearing, and opportunity to defend, as well upon the question of necessity as upon the question of compensation."

After the Legislature itself declared the necessity for the taking of Appellant's property, the mere ceremony of determining the necessity by the State Highway Commissioner meant nothing. To deny the Appellant the right to demand a Jury of twelve freeholders to determine as to whether or not it was necessary to destroy Appellant's highly desirable residential property by placing a railroad thereupon, was certainly a denial to him of a material and substantial right.

There is nothing in the "Highway Condemnation Act" to authorize the Commissioners to appraise land which is being condemned for railroad purposes. A condemnation tribunal is one of special and limited jurisdiction. "A Court of limited jurisdiction or a Court acting under special powers, has only the jurisdiction expressly delegated."

State vs. Metzger, 26 Mo. 65.

> "To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter in the suit." *Scott vs. McNeal,* 154 U. S., 34.
>
> "No judgment of the Court is due process of law if rendered without jurisdiction in the Court." (id)

Appellant has been at all times ready and willing to consider a bona fide offer by either the State or the Railway Company, for the purchase of his property. At no time has any negotiation been opened with him for such purpose. It is the contention of the Appellee, Frank F. Rogers, that under the "Highway Condemnation Act" such an effort to purchase is unnecessary before starting condemnation proceedings. He also contends that he is precluded from so doing by a provision of the contract between the State and the Railway Company, being Paragraph 8 of Sec. 10 of Act 340 of the Public Acts of 1927, which reads as follows:

> "No purchases (along the proposed new right of way) shall be made except on the joint approval in writing, of said State Highway Commissioner and Chief Engineer of the Railway Company, and should either disapprove of the price of any proposed purchase, then the same shall not be concluded, but the land therein involved shall be acquired by condemnation."

The above provision has denied to the Appellant that right which is secured to all other persons under similar circumstances. It certainly is of great importance, because without such a bona fide effort having been first duly made, the Court has no jurisdiction to continue with the condemnation proceedings to take the property. In the recent case of *Re Petition of Rogers*, 243 Mich. 517, the Court carefully considered the meaning of a "bona fide effort to purchase" and made the following comment:

> "This Court has repeatedly held that a bona fides effort to acquire the land by purchase is made mandatory by statute and, therefore, is jurisdictional, in the sense of a condition precedent to the right to invoke the power of eminent domain. * * * The statute of eminent domain is to be strictly

> construed and its jurisdictional condition must be established in fact, and may not rest upon technical waiver or estoppel. * * * The price to be offered the land owners was fixed in Lansing by the State Highway Department, and an employee of the Department was directed to make the offer. This offer of three hundred dollars per acre bore a take-it or leave-it spirit, for it was the only authority conferred upon the agent in sending him to negotiate the purchase. The Highway Department could not pay the price asked by a property owner if not reasonable, neither is the property owner required to accept an inadequate price offered by the Department, or, in case of refusal, be subjected to the expense and trouble of condemnation proceedings. The law intends a purchase based upon a fair and reasonable price reached in a good faith effort to purchase, a bona fides effort to purchase involving a willingness to pay the market value of the land wanted, and this means the amount for which the property would actually sell at the time. If the land owner is unwilling to sell, such fact does not excuse the plaintiff from making a reasonable effort to come to an agreement."

The determination for the taking of Appellant's property was filed on the 21st day of April, A. D. 1928. Ever since that date the Appellees have claimed title to Appellant's property, and have taken possession thereof in the construction of a railway right of way, and Appellant has been deprived of the title and use of his property from that date to the present time without having received any compensation. It was recently held by this Court in the case of *Liggett and Myers Tobacco Co. vs. United States*, 274 U. S. 215, that where the title to property is taken before compensation is paid, interest must be allowed to the owner thereof, from the time the property was taken,

to the time of payment of the compensation. This interest is an element of just compensation and without which the owner is deprived of his property without due process of law. All other persons in the State of Michigan whose property is taken for railway use retain title and possession until compensation is first paid. This is one of the valuable rights which has been denied to Appellant by Act 340 of the Public Acts of 1927.

Appellant Has Been Deprived of a Great Portion of His Damages

The "equal protection" clause of the Federal Constitution requires that the same elements of damages be considered and paid when private property is condemned for a public use, regardless of whether the party condemning is a governmental organization or a private corporation. It requires that all persons whose property is taken by eminent domain to be used for railway purposes, shall be compensated on an equal basis. In the case of *Beveridge vs. Lewis*, 137 California 619, a situation arose very similar to the one presented in the case at bar. A California constitutional provision provided that when property was taken by a natural person, a smaller sum of damages should be paid than when taken by eminent domain by a corporation for the same public use. Speaking from the standpoint of the property owner, the Court said:

> "Can the Legislature provide that he shall receive a smaller sum for the taking of the land when it is taken by a natural person than when it is taken by a corporation for precisely the same use, especially when the natural person may at once transfer his property to the corporation? Or, suppose two cases: land belonging to one person is being taken by a natural person and other land

> belonging to him by a corporation, the uses and burdens being in all respects similar. Can the law provide that in one case an allowance shall be made for supposed benefits and not in the other? I think it must be answered that the Legislature cannot provide for the one case a less favorable rule than the Constitution has provided for the other. They are entitled to the equal protection of the law, or, as was said in *Yick Wo vs. Hopkins,* 118 U. S., 356, 'the protection of equal laws'."

Benefits will be deducted from Appellant's award, and he will be deprived of consequential damages.

1. *Deduction of Benefits*

Under the "Railway Condemnation Act" there is no provision whereby benefits arising to the remainder of the property may be deducted. That was the common law rule of the State and has been followed from the beginning by the Courts. In the case of *Plantenga vs. Grand Rapids, etc. Ry. Co.,* 190 Mich. 661, the Plaintiff sought damages caused to his property by the construction of a railway. The Defendant atempted to show that Plaintiff would be greatly benefitted by the construction of the railway. The evidence to show benefits was excluded, and the ruling was upheld by the Supreme Court.

In the case of *Detroit, etc. Ry. Co. vs. Bank,* 196 Mich. 660, which arose under the present "Railway Condemnation Act", it was sought to deduct benefits from the Respondent's award. Construing the "Railway Condemnation Act", the Court spoke as follows:

> "The statute under which these proceedings are brought nowhere refers to benefits, and no authority is vested in the jury to estimate the benefits and reduce the award for the value by taking therefrom the amount of the estimated benefits."

"• • • In the absence of authority given by statute, benefits cannot offset the damages and should not be considered in proceedings of this kind." (To the same effect see *Highway Commissioner vs. Breisacher,* 231 Mich., 317.)

In the late case of *In Re Widening of Bagley Avenue,* 248 Mich. 1, where the City of Detroit was condemning property for street purposes, under the charter, which contained no provision for the deduction of benefits, it was sought to put in testimony to show that the property owner would be benefitted by the street project. In holding the testimony incompetent, the Court spoke as follows:

"They (the Jury) must not value the property upon any assumption of facts that do not exist; they could not consider benefits to the remaining property of the respondents in this proceeding; the testimony of any witness based on or including such benefit or advantage and charging any benefit or advantage against respondents' remaining property in order to reduce damages, was incompetent; the land or other property taken was to be valued and paid for on the basis of its best and highest use in every instance."

By the above decisions we have a firm rule established in this State that benefits cannot be considered nor deducted when property is condemned for railway purposes, and all other persons excepting Appellant have the benefit and enjoyment of this rule.

Under the "Highway Condemnation Act", however, we have a provision which allows the deduction of benefits when property is taken for *highway purposes.* Sec. 18 reads as follows:

"• • • And in like manner the benefits accruing to owners of lands by reason of laying out, alter-

> ing, widening or otherwise improving any highway or changing the line thereof, shall be taken into consideration in determining the damages to be paid to any such owner as compensation for the taking of any of his property for any such highway purpose."

The case of *Fitzsimons & Galvin vs. Rogers*, 243 Mich. 649, was one which arose to test the validity of the proceedings which are attacked in the case at bar. Some owners along the same project which affects Appellant claimed that many of their rights under the State Constitution were violated by the condemnation of their property under the "Highway Condemnation Act" in the proceedings according to Act 340 of the Public Acts of 1927, and in compliance with Act 215 of the Public Acts of 1925. One of the claims of those Respondents was that they would not receive the same amount of compensation under the "Highway Condemnation Act" as they would receive had the proceedings been brought in accordance with the "Railway Condemnation Act". The Supreme Court of Michigan went to unheard of extremes in order to uphold the constitutionality of the Acts questioned. The Court held that the proceedings were properly instituted in a Highway Condemnation Tribunal, and that it was unnecessary to afford equal access to the Railway Condemnation Tribunal when the property was being taken in the first instance by the State. The Court further laid down a rule upon the measure of damages, a question which was not then before it. It stated:

> "It is true that the highway law of this State provides that in fixing compensation the benefits accruing to the property owners are offset against the damage awarded." (Citing Section 18 of the "Highway Condemnation Act.") (p. 664)

The Court laid down the following rule which we challenge any one to find anywhere else:

> "It (just compensation) includes the value of the land, or the amount to which the value of the property from which it is taken is depreciated."

This rule within itself lays down two yardsticks for the measure of damages which are different. The first part, "value of the land", simply means the value of the land taken without allowing for consequential damages. The alternative provided is "or the amount to which the value of the property from which it is taken is depreciated" is an entirely different rule having to do only with consequential damages. To apply either of these rules would clearly deny to the Appellant the equal protection of the laws.

Showing beyond a doubt that Appellant will receive a lesser sum of damages under the "Highway Condemnation Act" than he would receive under the "Railway Condemnation Act", in the *Fitzsimons & Galvin vs. Rogers* case, *supra*, the Court spoke as follows:

> "That one legislative Act may contain a different provision than is found in another as to the measure of damages is not controlling. The test is whether the provision in the Act falls short of the constitutional requirement for just compensation" (p. 663).

In *Beveridge vs. Lewis, supra,* 137 Calif., 632, the Court spoke as follows:

> "Now, there is absolutely no natural or reasonable distinction between different persons seeking to exercise the right of condemnation, with respect to the measure of compensation for the land taken and damages for land not taken. A law might per-

> haps rightfully discriminate between the *business* of operating a railroad and some other kinds of business; but as between parties intending to engage in that business, the right of way is the same, no matter what person operates it, and there is no reason why one person should pay more for it than another person, except a desire to unjustly discriminate" (p. 632).

In the case of *Fitzsimons & Galvin vs. Rogers, supra,* the Fourteenth Amendment was never raised. Had the "equality clause" of that Amendment been raised, there is no question but what the State Supreme Court of Michigan would have been compelled to follow the decision in the case of *Beveridge vs. Lewis, supra.*

It is the contention of the Appellees, and it was so held in the Fitzsimons & Galvin case, that the "Railway Condemnation Act" provides for damages which are greater than those required by the State Constitution, and that the "Highway Condemnation Act" provides for sufficient damages to satisfy the Constitutional requirement of "just compensation". The District Court below adopted the same theory when it over-ruled Appellant's claim that he was receiving a lesser sum of damages than was required by the equality clause of the Fourteenth Amendment when it said:

> (Page 919) "I cannot agree with this argument, which, I think, is completely answered and overruled by the decision of the U. S. Supreme Court in *Brown vs. U. S.*, 263 U. S., 78."

A close examination of the Brown case, however, will show that no question as to the measure of damages was raised.

Another case which arose under the provisions of Act 340 of the Public Acts of 1927, and which involved the

same condemnation proceeding which is attacked in this case, is *Johnstone vs. Detroit, Grand Haven & Milwaukee Railway Company,* 245 Mich., 65. The question of damages was brought squarely before the Court. Upon this question the Court spoke as follows:

> "Under the Highway Act benefits are considered in determining the amount of compensation. Under the Railroad Act they are not" (p. 83).

With the above construction placed upon the two Condemnation statutes, can there be any question that there is a difference in the measure of compensation provided under each? We submit that there is a different measure of compensation, and that this difference, of which Appellant is being denied, is a controlling factor in determining as to whether or not Appellant has been denied the equal protection of the laws.

In the case of *Johnstone vs. Detroit, etc., Railway Co., supra,* the Court said:

> "In determining Plaintiff's compensation, the benefits to their property, if any, *arising from the construction and operation of the railroad, are proper to be considered.*"

Acting upon this construction, the Appellees have been producing all kinds of incompetent testimony before the Court Commissioners to show that the Railway Company in the future will operate commuter interurban service between the Cities of Detroit and Pontiac, and that there will be constructed above the right of way an elevated highway for the convenience of the persons living along the enterprise. There is no doubt but what the Commissioners will adopt the theory that they are allowed to deduct benefits and will actually deduct tremendous sums from Appellant's award because of such fanciful and

future benefits which they are called upon to assume will arise. Why should Appellant be subjected to the deduction of benefits while no other person within the State whose property is being taken for railway purposes is subjected to such a deduction?

In the case of *Beveridge vs. Lewis,* 137 Calif., 619, the Court said:

> "If he (the property owner) is compelled to contribute all that he could possibly gain by the improvement, while others in all respects similarly affected by it are not required to do so, he does not receive the equal protection of the law" (p. 625).
>
> "Can the law provide that in one case allowance shall be made for supposed benefits, and not in the other? I think it must be answered that the Legislature cannot provide for the one class a less favorable rule than the Constitution has provided for the other. They are entitled to the equal protection of the law" (p. 623).

2. *Consequential Damages to the Remainder of the Tract*

When property is condemned under the provisions of the "Railway Condemnation Act", the tribunal, which is a jury of twelve men, has jurisdiction to award all consequential and other damages which the property owner will suffer by virtue of the placing of the railway through his property. There is no provision whatever under the "Highway Condemnation Act" allowing the Commissioners to award compensation for consequential damages which the property owner will suffer to the remainder of his tract. The Highway Tribunal is one of special, and limited jurisdiction. It has no authority which is not ex-

pressly delegated to it by the statute. In view of the absence of any authority, we must conclude that the Court Commissioners will award Appellant nothing for the tremendous consequential damages which he will suffer when the railway is relocated upon his property.

The City of Detroit has a population of approximately one and three-fourths millions of people. The City of Pontiac is twelve miles north of the City of Detroit. The City of Birmingham lies between the two, and is approximately seven miles north of Detroit, and five miles south of Pontiac. Woodward Avenue connects the City of Detroit and the City of Pontiac and runs through the City of Birmingham. The Appellant's property lies a short distance from the outskirts of the City of Birmingham and it is in the center of a district which is highly restricted residential property. Appellant's property is at least three-fourths of a mile away from Woodward Avenue, which the State is seeking to widen. The tracks of the Detroit, Grand Haven & Milwaukee Railway Company lie adjacent to the East side of Woodward Avenue, and they are now approximately three-fourths of a mile from Appellant's property as stated. It is sought to relocate the aforesaid railway tracks through Appellant's highly desirable residential property, and it is for that purpose that his property is being condemned.

This Court will take judicial notice of the fact that a boulevard two hundred feet (200′) wide through residential property is often of great benefit. On the other hand, a railroad with all of the appurtenant tracks and yards through residential property damages the surrounding property to such an extent that it is practically valueless for residential purposes. Without question, Appellant's seventy-two (72) acres of subdivision acreage will be damaged in excess of One Hundred Thousand Dollars

($100,000) as a consequence of re-locating the tracks of the Detroit, Grand Haven & Milwaukee Railway Company through it.

By removing Appellant's case into a Highway Condemnation Tribunal from a Railway Condemnation Tribunal, where it belongs, the State has deprived Appellant of his absolute right to recover consequential damages to the remainder of his tract which he would unquestionably have received if the proceedings had been brought in accordance with the "Railway Condemnation Act". His right to recover this element of damages under the "Highway Condemnation Act" is speculative, and may be disregarded entirely by the Commissioners when fixing the compensation. To subject Appellant to such a hazardous procedure, while allowing the terms of the "Railway Condemnation Act" to all others, certainly denies to Appellant the equal protection of the laws guaranteed by the Fourteenth Amendment, and the District Court below was in error when it ignored this claim of Appellant.

State Highway Commissioner Given Power of Arbitrary Discrimination Against Appellant

Section 2 of Act 215 reads as follows:

> "The procedure that is, or may be, prescribed for condemnation proceedings instituted by boards of county road commissioners or the procedure that is, or may be, provided for the condemnation by state agencies and public corporations of private property for the use or benefit of the public, is hereby expressly made applicable to any proceeding brought by the State Highway Commissioner under the provisions of this Act."

Appellant contends that this Section specifically authorizes the State Highway Commissioner to proceed in any given case under either one of two separate, distinct and different condemnation acts. He is given the absolute power of arbitrary discrimination, against some individuals, and in favor of others. When any case arises he may decide in his own mind, without any judicial finding or determination, as to whether he will employ the liberal terms of the "State Agencies and Public Corporations Act" or whether he will employ the terms of the "Highway Condemnation Act" which is prescribed for condemnation proceedings instituted by Boards of County Road Commissioners. Act 340 of the Public Acts of 1927, which authorizes the condemnation of Appellant's property, provides that the State Highway Commissioner shall institute proceedings therefor "in accordance with the general laws of the State of Michigan". The State Highway Commissioner concluded that this authorized him to proceed under the provisions of Act 215 above quoted, and thereupon discriminately chose to take Appellant's property by virtue of the "Highway Condemnation Act" instead of the "Public Corporations and State Agencies Act" or the "Railway Condemnation Act".

The difference between the "Highway Condemnation Act" and the "Railway Condemnation Act" has been heretofore set out. The "Public Corporations and State Agencies Act" being C. L., 1915, Sec. 353, et seq., provides that the property owner shall have a trial by jury in a Court of record. A bona fide effort to purchase his property is required before a condemnor may start proceedings to take the property. The title to the property does not pass from the owner until just compensation is first paid. The benefits arising by virtue of the improvement cannot be considered or deducted from the award

of compensation. Consequential damages are always allowed. The jury is the one invested with the power to determine or reject the question of necessity. In case the property owner is aggrieved with the award, he has the right to appeal to the Supreme Court of the State of Michigan to review the law and the facts of the case in the same manner as provided on appeal in chancery cases.

When the State Highway Commissioner determined in his own mind to proceed under the "Highway Condemnation Act", he thereby automatically denied to the Appellant all of the privileges, immunities and safeguards which were provided in the "Public Corporations and State Agencies Act". As to other persons along the same project as Appellant, whose property might be taken for the same use as Appellant's property, the State Highway Commissioner could proceed under the "Public Corporations and State Agencies Act" and thereby allow to those owners all of the aforesaid privileges and immunities, which he has denied to Appellant.

A similar case arose in California, in which certain ordinances vested arbitrary discretion in the execution of the ordinances in an administrative officer. Condemning these ordinances in the case of *Yick Wo vs. Hopkins*, 118 U. S., 356, the Court spoke as follows:

> "They (the ordinances) seem intended to confer and actually do confer not a discretion to be exercised upon a consideration of the circumstances in each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons, so that if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition, demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for

> redress by the judicial process of mandamus to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary and acknowledges neither guidance nor restraint" (p. 366).

In a similar manner as in the case above, Sec. 2 of Act 215 prescribes no conditions for the purpose of determining which condemnation act shall be used. The State Highway Commissioner has unrestrained authority to use his own personal will, whim or caprice in the application of the Act.

In the *Yick Wo* case, the Court held, in declaring that the ordinance denied certain persons the equal protection of the laws, as follows:

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and unequal hand so as practically to make unjust and illegal discrimination between persons in similar circumstances material to their right, the denial of equal justice is still within the prohibition of the Constitution" (p. 373).

In the case of *Baltimore vs. Radecke,* 49 Md., 217, the Court, declaring the power of arbitrary discrimination vested in an administrative officer illegal, spoke as follows:

> "In fact, an ordinance which clothed a single individual with such power (of discrimination) hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void" (p. 230).

In the case of *State vs. Carter* (159 La.), 105 Southern, 247, a Louisiana statute vested arbitrary power in the State Highway Commission to grant or withhold certain privileges in regulating bus companies as it saw fit. The Court of that State, in declaring the arbitrary power of discrimination vested in the State Highway Commission by the statute denied to the Plaintiffs the equal protection of the laws, spoke as follows:

> "Our opinion is that the 11th Section of the Statute is violative of the Fourteenth Amendment. A statute or ordinance which, instead of prescribing a uniform rule of action, undertakes to vest in a public officer or commission the authority to discriminate in favor of or against persons engaged in a legitimate business or occupation or enjoying a common right, by granting or withholding a license or permit or approval, arbitrarily or according to the officer's or commission's favoritism or whim, is violative of the equal protection clause of the Fourteenth Amendment.
>
> "Insofar as the statute undertakes to give the Highway Commission arbitrary authority to favor one or discriminate against another person engaged in the business, the statute withholds the equal protection of the law."

There are many real estate operators who own property along Woodward Avenue, who desire the removal of the railway tracks from the old location, and who have favored the condemnation proceedings. The State Highway Commissioner has purchased the property from those owners on the theory that their damages could be assessed under the terms and provisions of the "Public Corporations and State Agencies Condemnation Act" and in that manner those owners have received a greater measure of damages than Appellant will be entitled to receive

under the "Highway Condemnation Act". This authority given to the State Highway Commissioner by Sec. 2 of Act 215 certainly denies Appellant the equal protection of a uniform law.

In the case of *Dickson vs. Harrington,* 108 Southern, 421 (La. 1926), an ordinance was considered which allowed the council of Shreveport to discriminately issue permits to certain filling stations, while withholding them from others. In holding that the ordinance denied to certain station operators the equal protection of the laws, the Court spoke as follows:

> "What makes the ordinance objectionable is that it prescribes no uniform rule of action, under which the council is to act in granting or withholding permits, but leaves it to the whim and fancy of the council to grant or withhold them."

In *Bizzell vs. Aldermen of Goldsboro,* 192 N. C., 348 (1926), the Court considered an ordinance which required a filling station to procure a permit from the Board of Aldermen before the location and operation of it. In condemning the ordinance, the Court spoke as follows:

> "There is no question as to the good faith of the Mayor or Board of Aldermen of Goldsboro, men of good character. The ordinances are far reaching and the law does not permit the enjoyment of one man's property to depend upon the arbitrary or despotic will of officials, however well meaning, or to restrict the individual's right of property or lawful business without a general or uniform rule applicable to all alike."

In *Gulf Refining Company vs. City of Dallas,* 10 S. W., 2d, 151, the Court considered the constitutionality of an ordinance which granted arbitrary powers to an officer

in granting or withholding a permit according to his own will. The Court spoke as follows:

> "The ordinance does not define the degree of hurt * * * but vests in the building inspector the right to exercise his own personal views in reference thereto. Therefore, as enforced against Appellant, the provisions of said ordinance are invalid as being in conflict with the Fourteenth Amendment of the Federal Constitution which provides * * * 'nor deny to any person within its jurisdiction the equal protection of the laws'."

The last expression of this Court in a case where the right of an individual to enjoy his property was dependent upon the whims of another is found in the case of *Seattle Trust Co. vs. Roberge,* 278 U. S., 116, 49 Sup. Ct. Rep., 51. In that case it was found that an ordinance prohibited the erection of a philanthropic home for children in a certain district without first having obtained the consent of two-thirds of the owners of property within four hundred feet of the proposed building. The Plaintiff in that case attacked the ordinance on the ground that it denied to him the equal protection of the laws and deprived him of his property without due process of law. The Court condemned the ordinance in the following language:

> "The Section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority — uncontrolled by any standard or rule prescribed by legislative action— to prevent the trustee from using its land for the proposed home. The Superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. *Yick Wo*

vs. Hopkins, 118 U. S., 356, 366, 368. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. (Citing cases)" (p. 122).

Likewise in the case at bar, the decision of the State Highway Commissioner in selecting a condemnation law, may be based upon his personal whim or prejudice, and still there is no review whatsoever of his decision provided for in a Court.

Appellant, therefore, submits that the District Court below was in error when it failed to find that the power of arbitrary discrimination in the enforcement of the laws, given to the State Highway Commissioner by Sec. 4 of Act 340 of the Public Acts of 1927, and Sec. 2 of Act 215 of the Public Acts of 1925, denied to Appellant the equal protection of the laws and deprived him of his property without due process of law.

The State is Taking Appellant's Property For a Use Which is Not Public

Sec. 1 of Act 215 of the Public Acts of 1925 of Michigan, authorizes the State Highway Commissioner to condemn property to be "exchanged" to a railway company whenever the Highway Commissioner has entered into a contract with the railway company for such an exchange. Sec. 4 of Act 340 of the Public Acts of 1927 authorizes the State Highway Commissioner to condemn Appellant's lands to be exchanged to the Detroit, Grand Haven & Milwaukee Railway Company. Secs. 1 and 5 of said Act 340 authorize a conveyance of Appellant's lands to the aforesaid railway company for railroad purposes. Paragraph 8 of Sec. 10 of said Act 340 provides that the State shall

be repaid all of the money expended in the condemnation of the property, by the railway company within a period of fifteen years.

It is Appellant's contention that these statutes and the contract entered into between the State of Michigan and the Detroit, Grand Haven & Milwaukee Railway Company provide for a taking of Appellant's property by the State, for a use which is not a public use, but which is a private use. The question of what constitutes a public use is always a judicial question to be decided by the Courts. The State of Michigan does not intend to operate a railway upon Appellant's land. Neither does it intend to construct and maintain a highway thereon. The State is condemning Appellant's property in the first instance for purely trading or exchanging purposes, and nothing else. The railway company is receiving the property for the purpose of operating a railway thereon in the future.

The Courts uniformly hold that property can never be condemned for trading or selling purposes merely, and that such purposes do not constitute a public use.

Beveridge vs. Lewis, 137 Calif., 618, was a case quite similar upon this point to the case at bar. In that case an individual attempted to condemn a railway right of way to be immediately conveyed to a railway company for railway purposes. The Court said in determining as to whether or not evidence was properly taken to show that the condemning person intended to convey the property:

> "The offer was in fact to show that Plaintiff was seeking to condemn the right of way solely for the purpose of transferring the same at once to the Los Angeles Pacific Railway which was engaged in building the railway, and which would own and operate it" (p. 620).

> "If the Court were convinced that the facts were as contended, the Plaintiff should not be allowed to maintain the proceeding at all. * * * One who seeks a right of way to sell merely is not in charge of a public use" (p. 621).

Trombley vs. Auditor General of Michigan, 23 Mich., 471, presents a case quite similar to the case at bar. A statute of Michigan authorized the Governor to condemn property within the State for the purpose of conveying it to the United States for the erection and maintenance of lighthouses thereon. Certain property was eased under the statute and an award for the damages was made by Commissioners. Officers of the United States Government declined to take the property and pay the award on the ground that said award was excessive, and for that reason the State refused to pay for the property. The owners brought an action of mandamus to compel the Auditor General to pay the award. Holding that the purpose for which the land was taken was not a public purpose, and therefore payment of the award could not be enforced against the State, the Court spoke as follows:

> "But when the State undertakes to do the same, not for any purposes of its own, but in order to turn the property over to the United States, the difficulties appear to us unsurmountable. In the first place, there can be no necessity for the exercise of this right by the States for this purpose, for the authority of the nation is ample for the supply of its own needs in this regard under all circumstances."

In like manner in the case at bar, the railway company has the absolute power delegated to it by the "Railway Condemnation Act" for the purpose of condemning any and all land necessary for the carrying on of its oper-

ations. There can be no underlying need or necessity for the State to step in and itself condemn the property for the railway company in this instance. The only excuse that the State has for entering into the proceeding is that it desires to widen Woodward Avenue, three-fourths of a mile away from Appellant's land.

In the case of *Salisbury Land & Improvement Co. vs. Massachusetts,* 215 Mass., 371, the Legislature established a Commission with the powers of eminent domain to procure land for public amusements and resorts. The Commission had the power to convey property after condemning to private individuals for the purpose of carrying on the work. In declaring that the taking of private property for trading purposes was unconstitutional, the Court spoke as follows:

> "The acquisition of land under the power of eminent domain to be devoted to private uses has been recently considered and discussed somewhat at length. It has been said that the exercise of the power of the State, either through taxation or eminent domain, to take land from one person with the intent of handing it over to another person, is not a public purpose, and is contrary to basic and essential principles of free government."

The very purpose for which Appellant's land is being condemned is to turn it over immediately to the railway company pursuant to the contract embodied in Sec. 10 of Act 340 of the Public Acts of 1927.

In the late case of *City of Richmond vs. Carneal,* 129 Va., 388, a statute was considered which authorized the taking of excess property for trading purposes. The Court there held that such a taking was not for a public use, and therefore deprived the owner of his property without due process of law.

City of Cincinnati vs. Vesier, 33 Fed., 2d, 242 (1929), is an instructive case upon this point. It was there held that the taking of excess property for trading purposes deprived the owner of his property without due process of law, contrary to the provisions of the Fourteenth Amendment, because such a taking was not for a public use. The Court said:

> "It is equally well settled that condemnation for a non-public use is a denial of due process of law, and that whether the use is public or private is a judicial question" (p. 244).

The primary purpose of the State of Michigan in procuring Appellant's land by eminent domain, is to trade it to the Detroit, Grand Haven & Milwaukee Railway Company for the surrender of its special charter. This charter is contained in the Laws of Michigan of 1855, No. 140 (Sec. 9). The Supreme Court of Michigan has construed this charter to be a contract between the railway company and the State of Michigan, the terms of which cannot be revoked. There is a special provision in the charter (Sec. 9 of said Act 140) which provides:

> "The said Company shall, on or before the first day of July, pay the State Treasurer an annual tax of one percent on the capital stock of said company paid in, which tax shall be in lieu of all other taxes, * * *."

The above provision has cost the State of Michigan millions of dollars in taxes, which would have otherwise been collected from the railway company. The importance of the provision will be seen in the fact that the State has attacked it in the following cases: 55 Mich., 94; 149 Mich., 122; 157 Mich., 144; 169 Mich., 72; 181 Mich., 266; and finally in the case of *People vs. Detroit, Grand Haven*

& Milwaukee Railway Company, 228 Mich., 596, where it was held by our Supreme Court that the aforesaid tax provision was a part of the contract with the State and could not be impaired by State legislation. The Court pointed out the great loss which the State was suffering by the aforesaid provision in the following language:

> "We have given due consideration to this case fully appreciating its importance. It is unfair and unjust that this Defendant should be permitted to escape from paying a tax upon its property upon the same basis as that of other railroad corporations doing business in the State. A greater burden is also thereby imposed on all other tax payers in the State, but the Courts cannot make the laws; they can but interpret them in conformity with the legislative intent. * * * The advantage gained by the Defendant and which has so greatly inured to its benefit, has been due to the holding that the contractural relation established by the Act was not subject to change, either amendment or repeal. This was settled for all time in the Joy and Powers cases."

With these facts in mind, it is not hard to see why the State made such enormous concessions to the railway company for the surrender of its special charter. The taking of Appellant's property, however, for that purpose is certainly not a taking for a public use, but is a taking for a private use. There is no contention that the people of the State will have any rights in the old charter of the railway company, which will be surrendered, to call for the exercise of the power of eminent domain. Therefore, Appellant contends that the State deprived him of his property without due process of law, and denied to him the equal protection of the laws when it contracted to condemn his property to be conveyed to the railway company for the surrender of its special charter. A close

examination of Act 340 of the Public Acts of 1927 and the contract embodied in Sec. 10 thereof will show that the impelling motive which prompted the State to pass Act 340, and enter into the contract embodied therein, was for the purpose of procuring the surrender of the railway company's charter.

The widening of Woodward Avenue, three-fourths of a mile away from Appellant's property, was simply a cloak thrown around the scheme in order to allow the condemnation of Appellant's property as a "highway project". Property cannot be condemned for partly a private and partly a public use. *Berrien Springs Water Power Co. vs. Circuit Judge,* 133 Mich., 48.

Brown vs. United States Distinguished from the Case at Bar

The Court below over-ruled all of Appellant's claims on the ground that the case at bar was governed by the principles of law laid down in the case of *Brown vs. United States,* 263 U. S., 78. The Court stated:

> "I cannot agree with this argument (of Appellant) which, I think, is completely answered and over-ruled by the decision of the United tSates Supreme Court in *Brown vs. United States,* 263 U. S., 78."

The court was certainly in error when it made this statement, because none of the contentions raised by Appellant in this case were raised in the Brown case. In the first place, the provisions of the Fourteenth Amendment apply only to state action. In no way do they apply to or limit the powers of the Federal Government. Consequently, of course, the equal protection clause and the

due process clause of that amendment were neither raised nor considered in that case. There is no reason why the Federal Government cannot make special laws applying to any situation which might arise. In the Brown case the United States Department of the Interior desired to construct an irrigation dam at American Falls, Idaho. It so happened that the town site was upon low land which it was desired to inundate by water confined in the dam.

The facts in the Brown case are set out in detail in the opinion of the District Court in *U. S. vs. Brown*, 279 Fed. 168. American Falls, Idaho, was a small town located along Snake River, in the midst of an arid territory. The Federal Government desired to construct a dam across Snake River to impound the flood waters for use in irrigating arid lands embraced in the Minidoka project, a short distance down the river. The water thus enclosed would submerge three-fourths of the town site, including the up-river portion. In order to keep the town site intact, for the accommodation of the people in the surrounding territory included in the project, the Government determined to condemn land on the Easterly side of the one-fourth of the city that remained unflooded, and to re-locate thereon the buildings and governmental enterprises which had formerly been upon three-fourths of the area of the town site desired to be flooded. By the laws of Idaho irrigation is recognized as a public use. "Hence the power of the Government to construct the proposed reservoir, and its rights to do all things incidentally necessary to that end, the Defendant does not question."

The Court remarked on p. 169:

> "Upon the other hand it must be conceded that generally the Government is without the power to

engage in the promotion of town sites, and unless the enterprise here bears a substantial relation to the irrigation project, it cannot be held to be of such a public character as to warrant the exappropriation of private property. Such relation does not necessarily arise from the mere fact that the town site may turn out to be profitable, and that the irrigation project being the beneficiary may be constructed at a smaller net cost than would otherwise be possible."

The above language shows without a doubt that the simple fact that the State will be greatly benefitted financially by the condemnation of Appellant's property under the Highway Act, for the purpose of trading it to the railway company for its special charter, and a portion of its right of way does not justify the taking of Appellant's property.

The important reason for the relocation of the town site in the Brown case was the fact that the Federal Government's authority to condemn property used by the City, an agent of the State, in connection with its governmental functions, is doubtful. The Court in *U. S. vs. Brown, supra,* p. 170, spoke as follows:

"However, the case here presents other considerations. The conditions are exceptional. The major part of the improved and occupied town site is essential to the execution of the great public work. Vested rights there are, in great variety and complexity, public as well as private. It is fair to assume that on the town site are streets and avenues, sidewalks, water pipes, sewers, schoolhouses, and possibly other structures. *The right to condemn may be doubtful, and even if the right be assumed,* the process of procuring title necessarily intricate and difficult."

> "By providing and improving an equivalent site in close proximity the Government may, by voluntary action on the part of private owners and the public, be able to acquire rights which otherwise it would be impossible or at least extremely difficult to extinguish" (id).

It will be noted from the above language that the right of the Federal Government would clash with that of the sovereign State when it attempted to destroy the State's governmental enterprises in connection with the City, and hence the right to codemn is doubtful. No such condition exists in the case at bar. The State has the absolute power to condemn any and all property, including the railway right of way lying adjacent to Woodward Avenue, needed for the purpose of widening or improving that highway. Compensation by substitution is entirely unnecessary as far as the State's right to condemn is concerned. Furthermore, if the State had condemned a part of the right of way of the Detroit, Grand Haven & Milwaukee Railway Company, then that railway company had the absolute power to condemn property for its own use, without the aid of the State or anyone else in connection therewith, by virtue of the provisions of the "Railway Condemnation Act."

It was due to the exceptionally peculiar conditions in the Brown case that the Court upheld the proceedings to condemn the property. The District Court in that case said:

> "In view of the unusual conditions here confronting Congress, I do not think it can be said that its judgment, in the language quoted is 'palpably without reasonable foundation.' Upon investigation it may have been fairly concluded that, without such authority, it would be impracticable for the Reclamation Service to execute the reservoir project" (279 Fed., 171).

The Brown case was brought to this Court on appeal, and the decision therein is reported in *Brown vs. U. S.* 263 U. S. 79.

It will be noted that this Court laid down no general principles of law, which would justify the taking of one man's land by the State for the purpose of turning it over to another, like the State is attempting to do with Appellant's property. This Court merely affirmed the decision of the Court below, that the means employed was the only practical one which could be used in view of the peculiar circumstances of the case, and without which the irrigation project would fail. The Court said:

> "The Plaintiffs contend that the power of eminent domain does not extend to the taking of one man's property to sell it to another, that such an object cannot be regarded as for a public use of the property, and, without this, appropriation can have no constitutional validity. The District Court held that the acquisition of a town site was *so closely connected with the acquisition of the district to be flooded and so necessary to the carrying out of the project* that the public use of the reservoir governed the taking of the town site. We concurr in this view."

Further commenting upon the peculiar topography of the territory surrounding the town, which required that a part of it be moved to one side in order to allow the flooding of the land, the Court spoke as follows:

> "The circumstances in this case are peculiar. An important town stood in the way of a necessary improvement by the United States. Three-fourths of its streets, alleys and parks, and of its buildings, public and private, would have to be abandoned. The buildings could not be moved except to the gradually rising ground East of the Snake River.

> There was a bluff 100 feet high on the other side of the river. The tract of 475 acres selected for the new town site *was the only practical and available place to which the part of the town to be flooded could be moved so as to be united with the one-fourth of the old town which would be left*" (p. 81).

The above language shows a marked distinction between the Brown case and the case at bar.

The Brown case, moreover, was one which arose in connection with a project for the reclammation of arid lands. The owner of property in the arid Western States holds it subject in every way to the right of the State or Federal Government in promoting irrigation projects. The taking of property for such purposes has been upheld by the Courts in cases where such a taking would never have been upheld if the property had been taken for a purpose other than irrigation. The constitutional provisions do not operate to check the power of the Government in arid areas as they do in other districts of the country, where irrigation is unnecessary. This Court has recognized that fact more than once. In the case of *Clark vs. Nash*, 198 U. S. 361, this Court said:

> "Whether the statute of a State permitting condemnation by an individual for the purpose of obtaining water for his land or for mining, is or is not a condemnation for public use and, therefore, a valid enactment under the Constitution, depends upon considerations relating to the situation of the State and its possibilities for agricultural and mining industries.
>
> The rights of a riparian owner in and to the use of water flowing by his land, are not the same in the arid and mountainous western States as they are in the eastern States.

This court recognizes the difference of climate and soil, which render necessary different laws in different sections of the country, and what is a public use largely depends upon the facts surrounding the subject, and with which the people and the courts of the State must be more familiar than a stranger to the soil.

While private property may not in all cases be taken to promote public interest and tend to develop the natural resources of the State, in view of the peculiar conditions existing in the State of Utah, and as the facts appears in this record, the statute of that State permitting individuals to enlarge the ditch of another and thereby obtain water for his own land, is within the legislative power of the State, and does not in any way violate the Federal Constitution."

In the Brown case there was no other available place where the town could be moved because of the peculiar topography of the property. It was impossible for the United States to condemn a part of the municipal organization which was an agency of the State. Therefore, the United States Government simply moved the town out of its way because that was the only available way out of the dilemma.

In the case at bar, however, there is ample room for moving the railway tracks to a new location, 100 ft. wide on either side and still adjacent to the highway. The new portion could still be connected up to the remainder of the line of tracks and the operation of the railway company would in no way be impaired. There is no peculiar topographical condition along either the highway or the railway which would prevent the removal of the railway to a new location 100 ft. away and thereby allow ample space for the widening of the highway known as "Woodward Avenue."

To say that the reasoning in the Brown case permits the State to remove the railway tracks three-fourths of a mile away to an entirely new location, comprising a distance of 9.1 miles is ridiculous. The State desires only 5¼ miles of the railway's present right of way for the widening of Woodward Avenue. How can it be said that this fact justifies the taking of property for a new right of way 9.1 miles in length as a "highway project"? If the State needs only 5¼ miles of the old right of way for highway purposes, why is it necessary for it to condemn the new right of way 9.1 miles in length, which is approximately four miles longer than the portion which the State desires for highway purposes? The only answer that can reasonably be given is that the State is seeking to enrich the railway company by handing over to it the new right of way which the State is now procuring. We think that the Brown case has no application to the facts presented in the case at bar, and therefore not controlling upon any of the issues herein raised.

In the Brown case, supra, the Court further pointed out reasons why compensation by substitution was the only method by which payment could be made for the land flooded, in the following language:

> "It would be hard to fix a proper value of homes in a town thus to be destroyed without prospect of their owners finding homes similarly situated on streets in another part of the same town or in another town near at hand. It would be difficult to place a proper estimate on the value of the streets and alleys to be destroyed and not to be restored in kind. A town is a business center. It is a unit. If three-fourths of it is to be destroyed, by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the State, whose

subordinate agent of government is the municipality, are injured. A method of compensation by substitution would seem to be the best means of making the parties whole. The power of condemnation is necessary to such a substitution" (p. 82).

In the case at bar, the State could condemn the 5¼ miles of the railway company's right of way adjacent to Woodward Avenue and desired for the widening thereof, without question. There is no doubt but what every element of damages could be precisely ascertained, and paid to the railway company. A railway company always holds its property, subject to the power of eminent domain in the State. There is certainly no reason to think that the railway company would find any more difficulty in procuring a new site, and locating thereon its line of tracks, than the State will be subjected to, in so doing. The inconvenience to the railway company in the operation of its trains will be the same, regardless of who the person is who re-locates the tracks.

It must be kept in mind that the proposed new right of way 9.1 miles in length will be of tremendous benefit and gain to the railway company. The State had to necessarily make the proposition attractive in order to induce the railway company to surrender its special tax-free charter. The new right of way which the railway company is receiving, will eliminate many of the inclines, declines and curves from its line of tracks, which hinder it in the operation of its trains along the old right of way adjacent to Woodward Avenue. Furthermore, the railway company desired to straigthen its right of way in order to make practical the construction of an elevated motor vehicle highway, for toll and reward, between the cities of Detroit and Pontiac, above its line of tracks. Since the State

has turned over the new right of way which runs across Appellant's property to the railway company it has sold or leased the aerial rights above the right of way, and there will be constructed within the immediate future an elevated motor vehicle highway across Appellant's lands, above the tracks of the Detroit, Grand Haven & Milwaukee Railway Company. It is admitted that the old right of way of the railway company along Woodward Avenue contained too many curvatures to make profitable the operation of an elevated motor vehicle highway above the tracks. It must be further remembered that the railway company will receive the 9.1 miles of railway right of way, for which it will pay only "highway prices," instead of the measure of damages which it would be required to pay if it procured the land by condemnation for itself under the "Railway Condemnation Act." The burden of bearing the loss which will necessarily result from this transaction, will not fall upon the State, but will fall directly upon the property owner, who in this case, is Appellant. These are conditions which did not confront the Court in the Brown case, because there was no contention there that the Government was enriching a third party at the expense of the property owner, as Appellant claims here.

Furthermore, the tax payers of the State of Michigan generally will be benefitted by the surrender to the State of the tax-free charter of the railway company. In order to reap this benefit for the tax payers, the State is using Appellant's property as the means of procuring the surrender of the aforesaid charter. Why should Appellant be called upon to give up his property for this purpose instead of having the burden distributed equally upon all tax payers in the State?

In the Brown case there was no contention that the Government was reaping a great benefit from a source

entirely outside of the improvement project, by reason of the terms of a private contract, as Appellant contends the State is doing in this case, by reason of the contract entered into between itself and the Detroit, Grand Haven & Milwaukee Railway Company, embodied in Sec. 10 of Act 340 of the Public Acts of 1927.

One of the most important distinctions between the Brown case and the case at bar, lies in the fact that the State is not using the regular methods of condemning property for railway purposes. In the Brown case, supra, the Federal Government employed the identical statute of the State of Idaho which would have been employed if any other party had condemned the property. In that way there could be no question but what the Government was employing the proper procedure. It was admitted that the same measure of damages would be paid to the Plaintiff in that case, as would have been paid by any other person, condemning the property for the same purposes. The property owner enjoyed procedural rights available to all other persons within the State under similar circumstances.

In the case at bar, however, the State is discriminating against Appellant by using statutes which deny to him procedural rights enjoyed by all other persons whose property is being taken for railway purposes, and which deprive him of a great portion of the damages which he is entitled to receive and which all other persons in similar circumstances do receive. These are questions which involve the equal protection clause and the due process clause of the Fourteenth Amendment to the Federal Constitution, and which were, of course, not before the Court when it decided the case of *Brown vs. U. S., supra.*

We have pointed out the many distinctions between the facts presented in the Brown case and the case at bar.

It will be seen that there is very little similarity between the facts in each case. Therefore, it cannot be said that the Brown case is governing upon the question of necessity, or the question of whether or not Appellant's property is being condemned for a public use, and we submit that the District Court was, therefore, in error when it decided that this case was governed by the principles laid down in the case of *Brown vs. U. S., supra.*

There Is No Necessity For the Taking of Appellant's Property By the State For Trading Purposes.

The Legislature specifically authorized the State Highway Commissioner to condemn any and all property necessary for the actual widening and improving of Woodward Avenue between the Cities of Detroit and Pontiac in Act 259 of the Public Acts of 1923. The power was all inclusive and did not except railroad property from the operation of the Act. In fact, the intention of the Legislature was to authorize the Highway Commissioner to condemn the 5¼ miles of the right of way of the Detroit, Grand Haven & Milwaukee Railway Company lying adjacent to the Easterly side of Woodward Avenue for highway purposes. This Act, of course, was passed several years before Act 340 of the Public Acts of 1927 which authorized the condemnation of Appellant's property three-fourths of a mile away from the highway for trading purposes. The State Highway Commissioner began proceedings and condemned all other property along Woodward Avenue necessary for the widening thereof in conformity with Act 259 of the Public Acts of 1923 as aforesaid. The Court had occasion to construe the terms of this statute in the case of *Highway Commissioner vs. Breisacher,* 231 Mich. 317, and the Court there held

that in the proceedings thereunder, the benefits arising by reason of the improvement, could not be considered nor deducted, and the owners of property involved by the proceedings therein, received damages accordingly. Act 259 of the Public Acts of 1923 remains in full force and effect at the present time, and may be utilized by the Highway Commissioner to condemn any land, including railway rights of way, necessary for the widening of Woodward Avenue.

Appellant contends that there can be no necessity for the condemnation of his property to be used as compensation, in substitution for the present right of way of the railway company, as long as there is any other means through which the State can procure the railway property which is desired to be actually used in the widening of Woodward Avenue. As long as the State Highway Commissioner is expressly authorized to condemn any property along Woodward Avenue for highway purposes, there can be no necessity of taking the property belonging to Appellant three-fourths of a mile away from that highway, under the guise of a "highway project." Furthermore, there is ample land along the Westerly side of Woodward Avenue which is now vacant, and which could be properly and conveniently utilized for the widening of that highway. With this fact in mind, can it be said that compensation by substitution is a public necessity? We think that it cannot. The fact that there is other property conveniently available to be actually used for highway purposes, and which is now vacant, negatives any presumption that the taking of other property three-fourths of a mile away is necessary. Compensation by substitution seems to be allowed only in case there is no other property available, and only in case the project would fail unless the compensation was made by substitution. As long as there is other property available there

can be no necessity for the State Highway Commissioner to reach out three-fourths of a mile from the highway and condemn property in order to compensate the railway company for that portion of its right of way which is desired to be surrendered for highway purposes.

Validity of State Statute Authorizing the State To Condemn Land to Trade to the Railway Company When the Railway Company Already Has the Right to Condemn That Land Itself.

It can never be necessary for the State to condemn property to be traded or turned over to a railway company for railway purposes when the railway company itself already has the right to exercise the power of eminent domain delegated to it.

Suppose the State actually took and used the 5¼ miles of the railway company's right of way lying adjacent to the Easterly side of Woodward Avenue for the purpose of widening that highway, there is still no necessity for the State to procure another right of way for the railway company, because the railway company itself has that power delegated to it by the State, and may exercise it at any time. There certainly can be no necessity under these circumstances for the State to go out and procure a new right of way for the railway company. It was to cover a situation just exactly like the one here arising that the Legislature passed the "Railway Condemnation Act," thereby delegating the power of eminent domain to the railway company and authorizing it to procure land necessary for its operations.

It has been held many times by this Court that the question of necessity for taking property by eminent

domain for a purpose, which is generally recognized to be a public one, is a legislative question, which may be determined by the Legislature. When the Legislature, however, attempts to declare the necessity for taking property, by eminent domain, for a purpose which is not generally recognized to be a public one, the Courts will step in and determine as to whether or not there is actually a necessity for the taking of the property for the designated purpose and whether or not the purpose is a public one. The taking of private property for trading purposes has never before been held to be a public necessity in the State of Michigan. It has never been considered necessary for the State or anyone else to procure land by condemnation for the purpose of turning it over to another person or institution who already has the right to exercise that power. On the contrary it has universally been held by the Courts that a statute which declares the necessity of taking property for such purposes deprives the owner of such property without due process of law. The rule is well stated in *Nichols on Eminent Domain, 2d E. Vol. 1, p. 126,* as follows:

> "Whatever may be the precise meaning of due process of law, there can be no question that it does not include such a gross violation of the rights of property and of the principles of constitutional government as the taking of one man's land by the State and giving it to another for his private use and benefit. * * * Such a taking when authorized by a State is in violation of the Fourteenth Amendment."

The above rule was applied in *Missouri Pacific Railway Co. vs. Nebraska,* 164 U. S. 403; *Fallbrook Irrigation District vs. Bradley,* 164 U. S. 112.

In the case of *Trombley vs. Humphrey,* 23 Mich. 471, the Legislature authorized the Governor to condemn land

to be turned over immediately to the Government of the United States for the purpose of erecting a lighthouse thereon. The Legislature declared the taking for that purpose to be a public necessity, just as the Legislature has done in procuring Appellant's land for the railway company. The Federal Government in that case had the right to exercise the power of eminent domain for lighthouse purposes, just as the railway company has the right to exercise the power of eminent domain in procuring a right of way for railway purposes in the case at bar. The question arose as to whether or not there was actually a necessity for the State to procure property to turn over to the Federal Government when that Government could procure the same land on its own behalf. It was contended that the purpose of erecting a lighthouse was a public purpose, analogous to the Apellees' claim in this case that taking property for a railway right of way is a taking for a public purpose. The Court held that although the erection of a lighthouse was in fact a public purpose, the taking of the property by the State, to be traded to the Federal Government for that purpose, was not a taking for a public purpose, and the Court judicially determined that there was no necessity for such a taking in the following language:

> "In the first place there can be no necessity for the exercise of this right by the States for this purpose, for the authority of the nation is ample for the supply of its own needs in this regard under all circumstances" (p. 476).

In the case at bar the railway has the right to condemn land under all circumstances, for its own use, just as the Federal Government did in that case. By the same analogy there cannot be a necessity for the State to condemn land to turn over to the railway company, even

though the operation of a railroad is a public purpose, and this Court will judicially determine as to whether or not there is in fact any necessity for the condemnation of Appellant's property for that purpose.

Suppose the Detroit, Grand Haven & Milwaukee Railway Company should decline to accept the new right of way from the State in accordance with the terms of the private contract. In such a case the State would have the property upon its hands, and would be obliged to sell it out for private purposes whenever it found it advantageous to do so. There is no means by which the Appellant could force the railway company to accept the property from the State, and operate its trains thereupon. If the railway company should reject the property, the only remedy which the State would have would be an action for breach of the private contract. Appellant's property nevertheless would be dissipated among private interests, over which the public would have no control. Upon this point the Court in the Trombley case, supra, spoke as follows:

> "We reach the extraordinary result that the State may seize and appropriate the lands of an individual for the sole purpose of turning it over to the Union for its needs; while on the other hand the Union is at liberty to accept it or not at its option, and if it shall refuse, the State, whose position in the taking was that of an agent merely, without any interest whatever of its own, must, nevertheless, retain and pay for the land, while the owner who was subject to this obligation only, that he should surrender his property to the public needs is found to have been deprived of it on a claim of necessity, which the Government repels, and has no security against its being appropriated to any private purpose for which the State authorities may find it advantageous to sell it. This simple state-

> ment appears to us to demonstrate that the State can have no such power as has been attempted to be exercised in the case before us. It is of no importance in this proceeding that the Federal authorities, at first, expressed a desire for the appropriation of the land" (p. 477).

In like manner in the case at bar, it is immaterial that the railway company has expressed a desire for the appropriation of the land, as that expression is not binding.

Continuing the opinion in the Trombley case, supra, the Court said:

> "The parties to it are the nation on the one side and the property owner on the other; and any interference of a third party except as he may be called in to judge between them, is mere impertinence. It would be absurd to hold that an individual might intervene, and of his own motion seize and hold the property of his neighbor, in order to turn it over to the nation if the nation should see fit to take and use it, but until we are prepared to hold this, we shall be compelled to deny to the State the like power, and upon the like reasons" (p. 478).
>
> "When Congress discovers a necessity for such legislation there can be little doubt of its adoption. * * * The power of the general Government is ample, and the only question we are to discuss is the authority of the State in cases in which the right of Federal action is unquestionable to step in and act for it" (p. 479).

In like manner when the railway company discovers it is necessary to procure land for right of way purposes, it also has all of the power and authority necessary to condemn the land needed, and the procedure is outlined

therefor. Its right to condemn is unquestionable.

In the Trombley case, supra, the Court said:

> "That cannot be due process of law in any case which rests upon legislative enactments either *not properly legislative in their nature,* or relating to subjects not within the sphere of the sovereignty enacting them. * * * The authority exercised, which assumes to be legislative, must be legislative in fact" (p. 483).

> "They (the enactments), therefore, constitute an attempt to appropriate the property of individuals without due process of law" (p. 483).

In the case at bar, as in the Trombley case, the Legislature attempted to legislatively declare the necessity for the State to take private property for the use of another. In Sec. 4 of Act 340 of the Public Acts of 1927, the Legislature declared the "lands necessary or required to carry out this Act and said proposed contract, are hereby declared to be a public necessity. * * *"

When the Legislature declared the necessity of the taking of Appellant's property for trading or exchanging purposes as aforesaid, it departed from the realm of things legislative, and attempted to acquire jurisdiction over things judicial. It declared the necessity for the taking of Appellant's property for a purpose which is not public, and thereby deprived Appellant of his property without due process of law, and denied to him the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution, and the District Court below was in error when it failed to so find.

The State of Michigan Cast Away Its Mantle of Sovereignty and Became Bound by the Same Rules of Law as an Individual Would Be, When It Entered Into the Contract with the Railway Company Prescribed in Act 340 of the Public Acts of 1927.

If the present procedure of the Appellee Rogers is lawful, then the only place in the whole State of Michigan where a steam railway and yards can be built through a land owner's property without just compensation being first made or secured, and with deduction of benefits, and under a highway tribunal, is a strip 9.1 miles in length between the Cities of Royal Oak and Pontiac.

Likewise, the only place in the whole State of Michigan where a steam railway and yards can be built through a land owner's property without his being given an option of a trial by jury as to the questions of necessity and damages, is the same strip of 9.1 miles between the Cities of Royal Oak and Pontiac.

The Appellees, while conceding that the State could not legally confer the power upon a private person or a private corporation which it has conferred upon itself to do and what it is doing for the railway company in this case, nevertheless contend that the Appellant cannot complain because the State of Michigan is a sovereign State, and is in the performance of a governmental function.

It is urged by Appellees that the contract between the State and the Railway Company is one which makes the State a principal and the Appellees Railway Company and Nelson Company, its agents. We contend that a careful reading of the contract discloses just the opposite;

that it makes the Railway Company the principal and the State Highway Commissioner the agent in some respects, and in other respects they are apparently partners.

We insist that when the State of Michigan entered into the agreement embodied in Act 340, Public Acts of 1927, by the terms of which it agreed to acquire a right of way for Appellee Railway Company, as to the manner of and the sums of money to be paid in acquiring the same, it deliberately chose to cast aside and throw off its mantle of sovereignty and thereby became a servant and agent of its principal, the Railway Company, and it should not be allowed in this proceeding any greater or special immunities than its principal, the Railway Company, would be allowed, insofar as the rights of innocent third parties, whose property is being taken, are involved.

In other words, we insist that in the carrying out of this principal and agent agreement which the State and the Railway Company deliberately chose to enter into and under which the State ceases to function governmentally, it should be held, in order to protect the rights of innocent third parties whose property is being taken, that the rights accorded to the State as a sovereignty are lost and that the State becomes bound precisely as its principal, the Railway Company, would be bound, or any private individual or private corporation would be bound, to proceed under the Railway Condemnation Law, and to pay consequential damages, and to refrain from deducting benefits, and this without regard to the motive which prompted the execution of the agreement or the consideration which passed between them for its execution.

We concede that in the building of a highway the sovereign state functions governmentally and as such enjoys many privileges and immunities which are not

accorded to an individual or private corporation. On the other hand, we contend that when the State enters into the business of acquiring a private right of way for a private corporation, it is not performing a governmental function and is not entitled to these privileges and immunities which it would be entitled to as a sovereign State if functioning governmentally. It is the character of the act being performed and the use to which the property is to be put, which is the determining factor on this question.

What if a private corporation instead of the State of Michigan had entered into this contract with the Railway Company, for the acquisition of its right of way and had passed a resolution by its board of directors that it would offer and pay to the property owners whose land it sought to take only such sum as the Railway Company dictated, that it would deduct benefits and would pay no consequential damages? Would anyone be foolish enough to say that this resolution would be of any legal force or binding effect upon the property owner whose land was sought? Certainly, not. Here we find the State doing practically the same thing. It passes a statute authorizing and under which it enters into an agreement whereby the Railway Company becomes the final arbiter as to the character and amount of damages which will be offered and deposited, and after which Appellant's property is taken, and now seeks to sustain the constitutionality of such Act by claiming that it is functioning governmentally in so doing.

By analogy it follows that when the State of Michigan passed Act No. 340, Public Acts of 1927, and provided that the State should enter into this agreement whereby it became the agent of the Railway Company in acquiring the right of way for the Railway under the Highway

Condemnation Law, which permits the Railway Company to have the last say as to the character and amount of damages offered and deposited before Appellant's land is taken, either the State lost all of its sovereign rights and immunities as such or the Act is unconstitutional in granting special immunities and denying equal protection.

Likewise, suppose a private corporation which enters into a contract with the Railway Company to procure a right of way for it, passes a resolution of its board of directors that it would proceed under the "Highway Condemnation Act" instead of under the "Railway Condemnation Act," thereby depriving the person whose land it was sought to take of the right to trial by jury, attorney's fees and other rights which the land owner is entitled to under the "Railway Condemnation Act." No Court would hold the resolution valid and binding on the land owner. This is just what the State, through its Highway Commissioner, is doing in this case, and all while it is acting not governmentally but privately.

In *Borski vs. City of Wakefield,* 239 Mich. 656, the City was engaged in the business of carrying passengers for hire, and in holding that in so doing it ceased to function governmentally and that the statute requiring the filing of a claim as a prerequisite to the beginning of suit would be unconstitutional if the Legislature so intended, our Supreme Court spoke as follows:

> "Our Court has said that when so engaged, it (the City) is governed by the same rules which control a private individual or business corporation under like circumstances * * * otherwise it would be granting to one class engaged in private business privileges or immunities not possessed by others under like circumstances. * * * When a city voluntarily enters into the same commercial business as private citizens, there is no good reason

> why it should be given special privileges not enjoyed by others who are compelled to meet its competition. * * *"
>
> "It would be giving the city a defense not available to private persons or public corporations while engaged in the same line of business."

Likewise, in the case at bar, if the State Constitution allowed the State to enjoy immunities not enjoyed by its citizens, in the condemnation of property, pursuant to a private contract, such provisions would deny to persons affected thereby, the equal protection of the laws.

In the case of *Carr vs. State,* 26 N. W., 778, the State issued bonds in order to raise money, under valid legislative authority. Later the State attempted to defeat its liability thereon by reason of its sovereignty. Holding that the State was bound the same as any other person would be in similar circumstances, the Court spoke as follows:

> "In entering into the contract it laid aside its attributes as a sovereignty, and bound itself substantially as one of its citizens when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual's rights and responsibility, measures, with few exceptions, those of a State whenever it enters into an ordinary business contract."

In the case of *Davis vs. Gray,* 16 Wall. (U. S.), 203, the State made certain land grants which it later desired to revoke. These grants were in the nature of a contract. Holding that the State was bound thereon, the Court spoke as follows:

> "When a State becomes a party to a contract, as in the case before us, the same rules of law are

> applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty."

The following note is found in 13 L. R. A., 170:

> "In entering into a contract, a State lays aside its attributes of sovereignty and binds itself substantially as one of its citizens under his contract and the law which measures individual rights and responsibilities measures, with few exceptions, those of the States."

In the recent case of *Johnstone vs. D. G. H. & M. Railway Company,* 245 Mich., 65, in which the Court construed Act 340 in connection with the taking of property along the same project which affects Appellant here, the Court spoke as follows:

> "The contention, that there is a difference in the character and effect of the power of eminent domain when exercised by the State than when used by a municipality, is not tenable. It is the same attribute of sovereignty whatever the agency through which it is exercised" (p. 84).

It has been the contention of the Appellees all the way through this case, that the State is functioning governmentally in acquiring Appellant's property by condemnation for trading purposes, and that, therefore, the State is exempt from all of the restrictions and conditions which are placed upon other persons when condemning property for like purposes. We think, however, that the above cases bring out clearly the fact that the State is bound to exactly the same rules as the railway company would be if it were condemning the property for itself.

When the State of Michigan entered into the contract as prescribed in Sec. 10 of Act 340 of the Public Acts of 1927, it thereby cast aside its sovereign immunities and became the agent of the railway company. And, for that reason, it has no greater powers or privileges than its principal, the railway company, would have if it were actually condemning the land.

The only excuse which the District Court below gave for allowing the State to proceed under special statutes to condemn Appellant's property, lies in the fact that the State is widening a highway known as Woodward Avenue. The widening of this highway the Court contends is an exercise of the sovereign powers of the State, and for that reason the State is acting governmentally, in condemning Appellant's property, none of which is less than three-fourths of a mile distant from said highway. The Court failed to take into consideration that the condemnation proceeding was only necessary to carry out the terms of the private contract entered into between the State of Michigan and the Detroit, Grand Haven & Milwaukee Railway Company. We think that Judge Hickenlooper, who wrote the minority opinion in the case, was correct when he said:

> "Under the circumstances in this case, I feel that it must be conceded that the plaintiff's property is being appropriated for railway purposes and not for a highway. It is being taken under the provisions of Act 340 of 1927, and this Act expressly provides for an appropriation for railway right of way. This is recognized by the Supreme Court of Michigan in the case of *Johnstone vs. D. G. H. & M. Railway Company, et al.*, 245 Mich., 65, wh[illegible] the Court says: 'In determining plaintiff's c[illegible] pensation the benefits to their property, if any, arising from the construction and operation of the railroad are proper to be considered.' * * * All

parties concede that it is to railway uses to which the land is to be put."

"To say that because a general highway improvement gives rise to the desirability or even necessity of so relocating the railway, the property needed is being taken for highway purposes, is to fail to distinguish between the impelling reason for condemnation and the use and purpose for which the lands are in fact taken, and to which they will in fact be put." 33 Fed. 2d, 920.

If Appellant's property is being taken for railway purposes, as we here contend, instead of for highway purposes, the State is not acting in a governmental capacity, and, therefore, its sovereign rights are not involved. That being the case, the State has no right to condemn Appellant's property, but if it does attempt to do so, it must proceed in the same manner and under the same statutes as the railway company would proceed if it were condemning the property on its own behalf.

In the two cases which have gone to the Supreme Court of Michigan in connection with the condemnation by the State of the new right of way to be traded to the railway company pursuant to Act 340 of the Public Acts of 1927, that Court has held that the enterprise for which the property was being condemned was a State project, and for that reason the State could exercise its sovereign power of eminent domain in any manner which it saw fit, so long as "just compensation" was provided in accordance with the Constitution of the State of Michigan. In the first case, *Fitzsimons & Galvin, Inc. vs. Rogers,* 243 Mich., 649, the Court pointed out that under the "Highway Condemnation Act" the damages would be less than they would have been if the property had been condemned in accordance with the "Railway Condemnation Act." The Court said:

> "There is no provision in our statutes for offsetting benefits against damages incident to taking land for a railway right of way, and in the absence of an express statutory provision such a deduction cannot be made."

The Court also said:

> "It is true that the Highway Law provides that in fixing compensation the benefits accruing to the property owner are offset against the damages awarded." id. (p. 664).

The Court further said:

> "That one legislative act may contain a different provision than is found in another as to the measure of damages is not controlling. The test is whether the provision in the Act falls short of the constitutional requirement for just compensation." id. (p. 663).

In spite of the clear cut discrimination pointed out by the above language, the Court went ahead and justified the procedure under Act 340 in accordance with the "Highway Condemnation Act" by saying:

> "The present proceeding instituted by him is 'in accordance with the general laws of the State,' and if those laws are properly administered plaintiff's rights as to just compensation will be fully respected." id. (p. 665).

It is clear by the above language that the Court in one breath said that the owners will receive a lesser sum of damages under the "Highway Condemnation Act" than they would receive under the "Railway Condemnation Act," and in the next breath it said that although this be true they will still receive all the compensation which is required by the State Constitution to afford "just compensation."

The Court in the *Fitzsimons & Galvin case, supra,* based its decision allowing the condemnation of the aforesaid property for railway purposes upon the fact that the State was functioning governmentally (p. 663), and also upon the case of *Brown vs. U. S.* (p. 659).

In the second case which arose in connection with the carrying out of the project embodied in Act 340 of the Public Acts of 1927, which is *Johnstone vs. D. G. H. & M. Railway Co.,* 245 Mich., 65, the Court said in regard to the measure of damages which the owners along the railway right of way will receive:

> "Under the Highway Act, benefits are considered in determining the amount of compensation. Under the Railway Act, they are not. * * * In determining plaintiffs' compensation, the benefits to their property, if any, *arising from the construction and operation of the railroad* are proper to be considered" (p. 83).

There is no question but what benefits will be deducted from Appellant's award, because of the above construction placed upon the "Highway Condemnation Act." These benefits will include both general and special benefits as well as those which are speculative and indeterminate. The Supreme Court of Michigan has allowed these deductions to be made. It has said that the procedure is proper and that the deductions can be made, because the State is a sovereign, and is exercising powers in connection therewith. It is not contended that such a deduction could be made if any other person, or the railway company itself, were taking the property.

Appellant contends, however, that the State is not functioning in a governmental capacity in the condemnation of his property, and that even though it were, it would be bound by the same procedure and would be liable for

the same measure of damages as any other person would be under similar circumstances. For the Legislature to attempt to use the State sovereignty for the purpose of defeating Appellant's claim for damages, and for the purpose of throwing Appellant into an improper tribunal, denies to him the equal protection of the laws and deprives him of his property without due process of law contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

In *Beveridge vs. Lewis*, 137 Calif. on p. 623, the Court said:

> "Can the Legislature provide that he (the owner) shall receive a smaller sum for the taking of the land when it is taken by a natural person than when it is taken by a corporation for precisely the same use, especially when the natural person may at once transfer his property to a corporation. • • • I think it must be answered that the Legislature cannot provide for the one case a less favorable rule than the Constitution has provided for the other. They are entitled to the equal protection of the law."
>
> "Now, there is absolutely no natural or reasonable distinction between different persons seeking to exercise the right of condemnation with respect to the measure of compensation for the land taken and damages for land not taken" id. (p. 632).
>
> "It is argued that even if the above propositions are, as a general rule, true, still they do not apply to the case of the exercise of the right of eminent domain. It is said that this right belongs to the State by virtue of its sovereignty, and that therefore the State may exercise the right with as much favoritism as it pleases. But the right to make laws upon the subject of eminent domain is no different from the right to make laws on any sub-

ject; the right to make laws at all is a sovereign power. But that power must be exercised within constitutional limits. The State could, no doubt, refuse to grant to any person the right to exercise the power of eminent domain, as it could refuse the right to a writ of attachment to anyone; but when it does legislate upon either subject, it must do so within the constitutional limitation against arbitrary discrimination" (p. 632).

The Court held that the statutes involved in the above case giving special privileges to some in eminent domain cases, while withholding them from others, denied to the persons who were discriminated against, the equal protection of the laws contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

In the case at bar the State is not condemning the property which it claims is necessary for the widening of Woodward Avenue, but it is acquiring Appellant's property for the use of another. It is admitted that neither the State nor any of its agencies will use Appellant's property for any purpose. The railway company is the one who devotes the property to its use. The State is using its governmental immunities and powers in the first instance to procure the property. In that way the railway company is obtaining the benefits of the sovereignty of the State of Michigan, while at the same time it is relieved of the burdens which are placed upon all other railway companies who condemn property. We contend that the exercise by the State of its sovereign powers against Appellant's rights, and for the benefit of the railway company, denies to the Appellant the equal protection of the laws and deprives him of his property without due process of law.

In the case of *Kessler vs. City of Indianapolis*, 199 Ind., 420, the City of Indianapolis, claiming to act in its govern-

mental capacity, attempted to condemn land, a part of which was to be used for park purposes, and a part of which was to be conveyed to a third party by the City.

The Indiana Supreme Court held that the resolution on behalf of the City, which attempted to appropriate land, a part of which was to be used by the City and a part of which was to be conveyed to another person by the City, was unconstitutional and void.

> "We believe that the inquiry of the courts is not limited alone to a consideration of whether the 'use'—'park purposes'—which a city assigns in its condemnation proceedings as the use to be made of the property, is or is not a public use, (if that were true there would really be no limitation on the power of cities to acquire property), but that a consideration may be had of all the surrounding facts and circumstances tending to show what is the actual, principal and real use to be made of the property."
>
> "The purpose for which private property is condemned is the very basis of the right to condemn." *Kessler vs. City of Indianapolis,* 199 Ind. Rep., p. 426.
>
> "The power of eminent domain may be exercised only for public purposes and not for a private purpose and the taking of private property for a private use violates the constitutional rights of the owner." id. (p. 427).

This case is of importance only because it shows that the mere naming of the project, for which Appellant's land is sought, a "highway project" is not controlling even though the State does so contend. This Court will go to the basic purpose for the taking of Appellant's property in determining which condemnation law should be applied.

We contend that the District Court below was in error when it said:

> "There is nothing in the Federal Constitution which prevented the State of Michigan from *the exercise of its own discretion and judgment in the adoption of the particular methods of enforcement of the right of eminent domain prescribed in the statutes here involved,*" 33 Fed., 2d, p. 920.

Appellant, therefore, submits that the District Court below was in error when it found that the State was functioning in a sovereign capacity when it undertook to condemn Appellant's property, and that the Court also was in error when it found that the State was taking Appellant's property for highway purposes.

Appellant also contends that when the State stepped in, in this particular instance, and attempted to act in a sovereign capacity, in order to defeat the rights of the Appellant, while carrying out the terms of a private contract, it thereby denied to the Appellant the equal protection of the laws and deprived him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

> "In the courts, parties similarly situated, are entitled to equal rights and privileges. The Constitution (equality clause) forbids discrimination between them." (In *Re City of Rochester,* 224 N. Y., 386.

Act 352 of the Public Acts of 1925 as Amended by Act 92 of the Public Acts of 1927, Being the "Highway Condemnation Act," Is Unconstitutional and Void.

It is the contention of all the Appellees that the Legislature intended that the "Highway Condemnation Act," being Act 352 of the Public Acts of 1925 as amended by

Act 92 of the Public Acts of 1927, should be used for the condemnation of Appellant's property. The Supreme Court of Michigan held, in the case of *Fitzsimons & Galvin vs. Rogers,* 243 Mich., on p. 665, that the Legislature intended that the "Highway Condemnation Act" should be used for the condemnation of property, pursuant to the terms of Act 340 of the Public Acts of 1927.

If the Legislature intended that the Highway Condemnation Act" should be utilized for the taking of Appellant's property by the State, for the purpose of trading it to the Detroit, Grand Haven & Milwaukee Railway Company, for railway use, then said Act is unconstitutional and void. It is well established that although a law be fair on its face, and impartial in appearance, yet if it be applied with an unequal hand and in a discriminatory manner, it will still violate the provisions of the Federal Constitution. *Yick Wo vs. Hopkins,* 118 U. S., 356.

Application of the "Highway Condemnation Act" to the taking of Appellant's property by the State Highway Commissioner as hereinbefore set forth, has deprived Appellant of the right to a jury trial upon the question of necessity and the question of compensation; the right to a railway condemnation tribunal; the right to demand a bona fide effort to purchase before his property could be condemned; the right to retain the title and possession of his property until compensation be first paid; the right to a general appeal to the Supreme Court of Michigan upon both questions of law and fact; the right to attorney fees and costs; the right to all of his damages without having benefits deducted therefrom; the right to consequential damages caused to the remainder of his tract.

All of the aforesaid rights and privileges have been denied to Appellant, while left in full force and effect as to

all other persons within the State of Michigan whose property could be condemned for railway purposes, and in that way the "Highway Condemnation Act" denies to Appellant the equal protection of the laws, and deprives him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

It was said in the case of *Bogni vs. Petrotti*, 224 Mass., 152:

> "It is an essential element of equal protection of the laws that each person shall possess, unhampered, the right to assert in the courts his rights, without discrimination, by the same processes against those who wrong him as are open to every other person. The courts must be open to all upon the same terms. No obstacle can be thrown in the way of some which are not interposed in the path of others. Recourse to the law by all alike without partiality or favor, for the vindication of rights and the redress of wrongs, is essential to equality before the law" (p. 156).

Furthermore, if the "Highway Condemnation Act" is intended to cover a condition where private property is taken for trading purposes, it provides for a taking of property for a private use and not for a public use, and thereby deprives Appellant of his property without due process of law contrary to the aforesaid amendment to the Federal Constitution.

If the Legislature intended that the "Highway Condemnation Act" be applied in certain instances, when property is condemned for railway purposes, and intended that in other instances the "Railway Condemnation Act" be applied for the taking of property by condemnation for railroad purposes also, the Legislature thereby divided

the general class of persons whose property might be taken for railway purposes into two groups, and applied to each group a separate, distinct and different condemnation law. Such classification is unequal, arbitrary, and discriminatory, and not based upon any reasonable difference for the purpose of classification.

It was said in *Fountain Park Company vs. Hensler*, 199 Ind. 95:

> "The characteristics which can serve as a basis of a valid classification must be such as to show an inherent difference in situation and subject matter of the subjects placed in different classes which peculiarly requires and necessitates different or exclusive legislation with respect to them" (p. 102).
>
> "The Legislature cannot take what might be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered factions of the original unit as two classes, and thereupon enact different rules for the government of each" (p. 103).

When the State Legislature, arbitrarily split into two groups the general class of persons whose property could be taken by condemnation for railway purposes, and applied the "Highway Condemnation Act" to one group, including Appellant, it thereby arbitrarily deprived the members of this group of all the rights, privileges and immunities secured under the "Railway Condemnation Act," and thereby denied to this group the equal protection of the laws contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

We submit, therefore, that the "Highway Condemnation Act," being Act 352 of the Public Acts of 1925 as amended by Act 92 of the Public Acts of 1927 as unconstitutional and void, as applied to the taking of Appel-

lant's property in this instance, because it deprives him of his property without due process of law and denies to him the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

The Injunction Should Be Granted As Prayed For In Appellant's Bill of Complaint

It was firmly established in the case of *ex parte Young*, 209, U. S. 123, that the Federal Courts will restrain State officers from enforcing State statutes which are in derogation of rights guaranteed by the Fourteenth Amendment. If the statutes are found to be in conflict with the Federal Constitution, the Federal Courts will declare them void and ineffective, and will enjoin the execution thereof.

The State of Michigan is a sovereign State, and for that reason is protected from suit in any Court by the Eleventh Amendment to the Constitution of the United States. The State has never consented to be sued, and there is no tribunal wherein Appellant could present a claim against the State in case his property were illegally taken and destroyed by said State or its agencies.

It was firmly established in the recent case of *Ohio Oil Company vs. Conway*, 279 U. S. 813, that where, by execution of a State statute, injury to an individual will be certain and irreparable, and for which he will have no redress, a temporary injunction restraining the operation of the statute pending a hearing on the merits of the case should be granted. The Court spoke as follows:

> "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the

> final decree be in his favor, while if the injunction be granted, the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted."

This Court held in that case that the interlocutory injunction should be granted restraining the operation of a State tax statute claimed to be in derogation of rights guaranteed under the Fourteenth Amendment, because there was no remedy against the State in case the statute were later found to be unconstitutional.

In the case at bar, an interlocutory injunction should have been granted, pending a hearing on the merits of the case. The Appellees would have been inconvenienced in no way as a result thereof, because they had ample other property upon which to continue the work of constructing the railway.

All of the Appellees have been in possession of Appellant's property since the filing of the "Determination of Necessity" for the taking thereof, on the 19th day of April, A. D. 1928. The State has also claimed fee simple title to the property since that date. All of the Appellees and their agents and servants are now upon Appellant's property damaging the same in connection with the construction of the steam railway right of way and tracks and yards thereon, and said Appellees have there created holes and trenches and have made cuts and fills through Appellant's land, and have constructed tracks and trestles thereon, and have piled loose dirt thereon and have also cut standing timber and trees therefrom and have damaged Appellant's land by crossing and re-crossing it in connection with the aforesaid work; and now all of the said Appellees are threatening to damage Appellant's land by constructing thereon an elevated motor vehicle

highway above the tracks of the Detroit, Grand Haven & Milwaukee Railway Company. In the same manner all of the Appellees are now upon Appellant's property, causing great, immediate, continuing and irreparable injury thereto, which they will continue to cause unless restrained by a decree or order of this honorable Court. The damage already caused to Appellant's property is enormous, and he is certain to suffer greater damage in the future. If this Court does not interfere with its injunction, Appellant will suffer damages in excess of One Hundred Thousand Dollars ($100,000.00), for which he will have no recovery. The State will say: "I am a sovereign State and cannot be sued." The Detroit, Grand Haven & Milwaukee Railway Company will say: "We did not take your property; we got it from the State of Michigan." The H. W. Nelson Company will say that it was merely a contractor, doing work for the State of Michigan, and, therefore, it will claim the same immunities from suit which the sovereign State claims.

The State Highway Commissioner and the Detroit, Grand Haven & Milwaukee Railway Company are now actively engaged in producing testimony before the Court Commissioners for the purpose of assessing Appellant's damages. After these proceedings have been concluded and a judgment entered, Appellant will have no further remedy because the case will be forever closed against him. If the proceedings as aforesaid to take Appellant's property are not enjoined by this Court, or the District Court below, the title to said property will be permanently wrested from him, and he will be damaged in excess of One Hundred Thousand Dollars ($100,000.00), for which he will have absolutely no remedy against anyone.

SUMMARY

In conclusion, we submit:

1. That the District Court below was in error when it entertained Appellees' motions to dismiss along with Appellant's application for an interlocutory injunction; and that it was also in error when it dismissed Appellant's Bill of Complaint, denied his application for an interlocutory injunction and dissolved the temporary restraining order, and that the single District Judge had no authority to enter the order of the Court below without the assent of the other two Judges.

2. That Act 340 of the Public Acts of 1927 of Michigan and the contract embodied in Sec. 10 thereof places Appellant in an arbitrary, discriminate and unreasonable class not based upon any proper difference for the purpose of classification; that it suspends the operation of the "Railway Condemnation Act" as to Appellant, and applies to his case special laws not applicable to all persons in similar circumstances; that it authorizes arbitrary selection and classification by the State Highway Commissioner, when enforcing its provisions; that it authorizes the taking of Appellant's property by the State of Michigan for a use which is private, and not a public use, the purpose being to trade Appellant's property after it be acquired to the Appellee, the Detroit, Grand Haven & Milwaukee Railway Company for railway purposes; that it authorizes the taking of Appellant's property in this instance under the "Highway Condemnation Act," to be used for railway purposes, thereby denying Appellant the procedural rights, and denying him the measure of damages as provided under the "Railway Condemnation Act" and which are allowed to all other persons

within the State under similar circumstances; and that all of the provisions of Act 340, and the contract embodied therein deny to Appellant the equal protection of the laws and deprive him of his property without due process of law contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

3. That Act 215 of the Public Acts of 1925 of Michigan, places Appellant in a class which is arbitrary, discriminate and selective, and not based upon any reasonable difference which Appellant bears to the general class of persons whose property is desired to be taken for railway purposes; that it allows and authorizes the State Highway Commissioner to arbitrarily and discriminately select the mode of procedure to be used in condemning Appellant's property; that it allows the operation of two or more general laws to be applied in any given case where property is condemned under the provisions of Act 215; that the statutes allowed as alternatives provide for different methods of procedure, and allow the payment of different measures of damages; and that the State Highway Commissioner has adopted the statute providing for the most harsh procedure and the smallest measure of damages to be allowed Appellant for the taking of his property; that Act 215 provides for a taking of private property for trading purposes which purpose is not a public use, but which is a private use; and that all of such provisions deny to the Appellant the equal protection of the laws and deprive him of his property without due process of law contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

4. That Act 352 of the Public Acts of 1925 as amended by Act 92 of the Public Acts of 1927, being the "Highway Condemnation Act" as applied to the taking of Appellant's property is discriminatory, unequal, and arbitrary;

that if the Legislature intended that the provisions of the "Highway Condemnation Act" should be applied for the taking of property for railway use, then said "Highway Condemnation Act" denies to the Appellant equal access to the "Railway Condemnation Act" as enjoyed by all others under similar circumstances; that even though said "Highway Condemnation Act" be fair on its face, and constitutional if applied in the proper case, in this instance it is being applied in an arbitrary and discriminatory manner, and the action of the State Highway Commissioner in applying the "Highway Condemnation Act" to the taking of Appellant's property is also unconstitutional; that said "Highway Condemnation Act" is being applied to the taking of Appellant's property so as to deprive him of his constitutional rights both as to procedure and as to the measure of damages for the taking of his property, and that, therefore, said "Highway Condemnation Act" denies to Appellant the equal protection of the laws and deprives him of his property without due process of law contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

5. Appellant further submits that there is no necessity for the State to condemn his property for the purpose of turning it over, immediately, to the railway company for railway purposes; that the railway company has the right to condemn all property needed for its own use under the "Railway Condemnation Act," and when the State steps in and attempts to use its sovereign powers and rights in favor of the railway company and against Appellant, it thereby denies to the Appellant the equal protection of the laws. Furthermore, there can be no necessity for compensation by substitution in this instance, as there is ample land on either side of the highway for either the widening of said highway or the relocation of the railway.

PRAYER

Appellant, therefore prays:

That this Court reverse the decree of the District Court below, and either (1) grant the prayer and relief prayed for in Appellant's Bill of Complaint, or (2) direct the Court below to vacate its Order dismissing Appellant's Bill, and reinstate Appellant's Bill of Complaint, and issue the proper interlocutory injunction.

And that this Court will grant such other and further relief as it may deem necessary in the premises.

Respectfully submitted,

FRANK H. DOHANY, *pro se*,
1021-23 Hammond Building,
Detroit, Michigan.

APPENDIX

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Act 340 of the Michigan Public Acts of 1927

An act to authorize the State of Michigan to contract with the Detroit, Grand Haven & Milwaukee Railway Company for the surrender of its special charter; for acquiring by the state of a new right of way for said railroad company of approximately nine and one-tenth miles in length in Oakland County, including lands for station grounds and facilities at Birmingham; for the exchange of said new right of way and additional lands for said railroad company's present right of way and grounds adjacent to and in proximity to state trunk line highway number ten, known as Woodward avenue; for advancing the money to said railroad company to defray the cost and expense of grading said new right of way for a double track railroad; for the construction thereon of a single track railroad; for the connection of said new single track railroad with the present railroad tracks of said railroad company; for making grade separations; the reimbursement of the state by said railroad company for the money to be paid, laid out and expended by the state in acquiring said new right of way and additional land for said railroad company, and for the money to be advanced by the state in the first instance to said railroad company to defray the cost and expense incurred by the state under said contract; the surrender of the special charter of said railroad company; its reincorporation under the general railroad law of the state, and the payment of taxes by it after its reincorporation; to prescribe the manner of executing said contract, to create a revolving fund to carry out the terms and conditions of said contract; to provide for the disposition of said revolving fund; and to authorize the state to acquire, as a state project, by purchase or condemnation, for highway purposes, a right

of way not to exceed seventy feet in width along and adjacent and/or parallel to either or both sides of the new railroad right of way as a part of the proposed relocation and improvement, where and when deemed advantageous and/or necessary by the state administrative board.

The people of the State of Michigan enact:

Section 1. The governor of the State of Michigan is hereby authorized and empowered to negotiate with the Detroit, Grand Haven & Milwaukee Railway Company for a surrender of its special charter; its reincorporation under the general railroad laws of the state, and its taxation in accordance with the general laws of this state providing for the taxation of railroad companies; to acquire or cause to be acquired by the state highway commissioner a new right of way for said railroad company approximately nine and one-tenth miles in length, in Oakland County, Michigan. The governor, secretary of state and state highway commissioner are authorized and empowered to convey said new right of way to be acquired by the State of Michigan, on behalf of said state, to said railroad company; to make, execute and deliver proper deed or deeds of conveyance for the same in consideration of the release by said railroad company and the transfer and conveyance by it to the State of Michigan of the right of way now occupied by said railroad company between mile post number thirteen and mile post number twenty-two and one-tenth adjacent to trunk line number ten in Oakland County as provided in the form of contract annexed hereto and made a part hereof, so that the right of way of said trunk line highway number ten, known as Woodward avenue, may be widened to a width of two hundred feet for a distance of approximately nine and one-tenth miles in accordance with said contract. The

state highway commissioner is hereby authorized and empowered to acquire by purchase or condemnation, as a state project, a right of way not to exceed seventy feet in width along and adjacent and/or parallel to either or both sides of the new railroad right of way as a part of the proposed relocation and improvement where and when deemed advantageous and/or necessary by the state administrative board.

Sec. 2. In case said contract shall be successfully negotiated, then and in such case there shall be created on behalf of the state, a revolving fund into which the state administrative board or its successors in authority shall pay or cause to be paid such sum or sums of money as shall from time to time in its opinion be necessary to pay, for acquiring the new right of way and additional lands necessary to carry out said contract, and to pay said railroad company for the performance of the work and the furnishing of the materials as provided in said contract; the state administrative board is authorized and empowered to loan to said revolving fund on the security of said contract, any such sum or sums of money as shall or may be necessary from the sinking fund created to retire state highway bonds; such loan or loans to pay interest at the rate of four and three-tenths percent per annum. Such interest to be charged against and to be a first lien on and payable out of any moneys in the state highway fund not otherwise specifically appropriated, and shall be charged against the cost and expense of widening and improving said trunk line highway number ten, known as Woodward avenue. All payments which shall or may be made by the Detroit, Grand Haven & Milwaukee Railway Company under and in pursuance of said contract, to reimburse the state for moneys advanced by it and paid, laid out and expended by it, or by said railroad company from moneys

advanced by the state in the first instance, shall be paid into said revolving fund until all of the expenditures required to be made by the state and the state highway commissioner in the first instance under said contract shall have been made, and the obligations thereby created shall have been paid, and all loans to said revolving fund shall have been fully paid.

Sec. 3. When the moneys which shall have been advanced in the first instance by the state in pursuance of said contract to said railroad company, and all moneys expended by the state or the state highway commissioner for which the state or the state highway commissioner is to be reimbursed by said railroad company under the terms of said contract, through said revolving fund shall have been fully paid by said railroad company to the state in accordance with the terms and conditions of said contract, then such moneys shall be retransferred by the state administrative board, or its successor in authority, from said revolving fund to be created, to the funds belonging to the state from which the same were taken in the first instance.

Sec. 4. The changes and improvements contemplated by this act and said proposed contract and the taking of the new lands described in said contract for the new right of way of said railroad company, including the additional lands described therein necessary for depot and yard purposes at Birmingham and all other lands necessary or required to carry out this act and said proposed contract, are hereby declared to be a public necessity, and the state highway commissioner is hereby authorized and empowered to acquire the same on behalf of the state by purchase or condemnation, in accordance with the general laws of the State of Michigan.

Sec. 5. The deed or deeds of conveyance of the new right of way for said railroad to be acquired by the state, and of such additional lands as shall be necessary to be acquired in accordance with said contract for station grounds and other purposes at Birmingham as specified in said contract, are to be conveyed by the state to said railroad company for railroad purposes; and the deed or deeds for the same shall be executed on behalf of the state by the governor and attested by the secretary of state and approved by the state highway commissioner.

Sec. 6. Said contract when made and entered into by the parties thereto and properly executed as provided therein, shall be valid and binding upon the parties thereto, their successors and assigns, conditioned however, upon the faithful performance of the terms and conditions thereof by the parties thereto.

Sec. 7. Said contract shall provide that when the terms and conditions thereof shall have been carried out, said Detroit, Grand Haven & Milwaukee Railway Company shall surrender its special charter, reincorporate under the general laws of the State of Michigan providing for the organization of railroad companies, and thereafter pay taxes without discrimination under the general laws of this state providing for the taxation of the property of railroad companies.

Sec. 8. Said contract shall provide that the railroad company shall repay to the State of Michigan all money advanced by the State of Michigan or the state highway commissioner in acquiring the right of way for said railroad company and in paying said railroad company, in the first instance, for doing and performing the work and in furnishing the materials contracted by it to be performed and furnished, at the times and in the amounts

and in the manner following: On the thirty-first day of December, in the year that the state shall have acquired control of the new right of way herein provided to be procured, the railroad company shall pay to the state the sum of two hundred fifty thousand dollars, and on each succeeding thirty-first day of December thereafter the further sum of two hundred fifty thousand dollars: PROVIDED, HOWEVER, That when the actual cost of carrying out said contract in its entirety shall have been ascertained, then the railroad company shall pay to the state a sum equal to one-fifteenth of said total actual cost, plus or minus the amount of over-payment or under-payment that shall have been made by said railroad company; And PROVIDED FURTHER, That said railroad company shall repay to the state all of the money paid, laid out and expended under the terms and provisions of said agreement within fifteen years after the first payment by it made, as herein provided. Said contract shall provide that no interest charge shall be made or accepted by the state on account thereof, except on past due installments, if any, and then at the rate of five percent per annum.

Sec. 9. The governor, for and on behalf of the State of Michigan, is hereby authorized to make such modifications in said contract as shall be provided for therein and the money necessarily paid out and expended in making the changes provided for in such modifications shall, in the first instance, be advanced by the state and the state shall be reimbursed therefor by the railroad company, in accordance with the terms of said contract.

Sec. 10. The form of said proposed contract between the State of Michigan and said railroad company is as follows:

THIS CONTRACT AND AGREEMENT, made and entered into by and between THE DETROIT, GRAND HAVEN

AND MILWAUKEE RAILWAY COMPANY, party of the first part, hereinafter called the "Railway Company," and THE STATE OF MICHIGAN, party of the second part, hereinafter referred to as the "State," WITNESSETH, as follows:

WHEREAS, The Detroit, Grand Haven & Milwaukee Railway Company is a corporation organized and existing under and by virtue of a special charter granted by the territorial council of the territory of Michigan, March seven, eighteen hundred thirty-four, and acts amendatory thereof and supplementary thereto, under which said statutory special charter said railway company pays annually a fixed percentage of its capital stock paid in as taxes to the state, and at the present time is paying annually twenty-five thousand one hundred seventy-one dollars and forty cents ($25,171.40); and

WHEREAS, the validity of said special charter of said railway company has been attacked from time to time by the state, in the courts of this state, and the validity of said special charter has been upheld by the Supreme Court of this state, and the Supreme Court of the United States; and

WHEREAS, The State of Michigan has for many years sought to procure the surrender of all of the special charters of all of the railroad companies in the State of Michigan, and to have said railroad companies incorporate under the general laws of the State of Michigan providing for the organization and incorporation of railroad companies and to pay the same rate of taxes to the state upon the true cash value of their taxable property, but that the said railway company has refused to surrender its special charter and to incorporate under the general railroad law, and to pay taxes upon the value of its taxable property in accordance with the general law of said state

providing for the taxation of the property of railroad companies; and

WHEREAS, the state is desirous of acquiring the right of way of said railway company extending from the railway company's mile post number thirteen in Royal Oak to the railway company's mile post number twenty-two and one-tenth between Pontiac and Birmingham, for the purpose of enabling the state to carry out its highway program, and to widen to two hundred feet the right of way of the public highway running substantially parallel to said right of way of said railway company, and known as Woodward avenue, and to have said railway company remove its tracks and equipment from said right of way; and

WHEREAS, said railway company executed in its own behalf by its president, attested by its secretary, a contract, which said contract was submitted to the legislature of the State of Michigan for its ratification and approval, at the extra session of the legislature convened in nineteen hundred twenty-six; and

WHEREAS, the legislature of the state, by act number one, of the public acts of the extra session of nineteen hundred twenty-six, approved in all respects said contract, and authorized the governor and the state highway commissioner to execute the same upon the part of the State of Michigan, attested by the secretary of state; and

WHEREAS, after said contract was so executed on behalf of the said railway company and submitted to the legislature of the state and approved by it, and the governor and the state highway commissioner were authorized to execute the same on behalf of said state, to be attested by the secretary of state, said contract was materially changed from the terms of the contract executed by said

railway company and submitted to the legislature of the state; and

WHEREAS, the plans and specifications attached to the contract executed on behalf of said railway company and on behalf of the state on September two, ninteen hundred twenty-six, were altered and amended subsequent to the passage by the legislature of the state and the approval by the governor, of act number one, of the public acts of the extra session of nineteen hundred twenty-six, and that by reason of the changes made in material parts of said contract after the approval of the same by the legislature by act number one of the public acts of the extra session of nineteen hundred twenty-six, said contract is claimed by the State of Michigan to be of doubtful validity, although the railway company does not admit any such invalidity, said amendments, additions and alterations made in and to said contract not having been ratified by the legislature of the state, and both parties to said contract desiring to obviate, as far as possible, any question of the validity of the same which might or could be raised on account of such modifications subsequent to its ratification and approval by the legislature of the state; and

WHEREAS, said railway company and the state have entered into negotiations which have resulted in the making of a new contract and agreement and the setting aside and cancellation of the contract and agreement made and entered into on September two, nineteen hundred twenty-six, and on file in the office of the secretary of state of the State of Michigan, subject to the ratification and approval of the same by the legislature of the State of Michigan and by the board of directors of said railway company;

Now, therefore, it is hereby agreed by and between the said railway company, party of the first part, and the State of Michigan, party of the second part, as follows:

1.

That the contract and agreement heretofore made and entered into under date of September two, nineteen hundred twenty-six, and filed in the office of the secretary of state of the State of Michigan, on the third day of September, nineteen hundred twenty-six, whether valid or invalid, be and the same is hereby cancelled, set aside and held for naught, on the approval of this contract by the legislature and its execution as herein contemplated.

2.

That the State of Michigan shall, upon the ratification, approval and execution of this contract by the parties thereto, as required by law, proceed with all convenient speed to procure or cause to be procured a new right of way one hundred feet wide for said railway company for the purpose of constructing thereon a new double track railroad, as and where provided in this contract, and the state shall, in the first instance, advance the money to defray the expense of procuring the same.

3.

Immediately after the ratification, approval and execution of this contract by the respective parties thereto as herein provided, said railway company shall, upon the new right of way being procured by the state, at once take charge of and construct with all convenient speed upon said new right of way so to be procured, a single track railroad, together with the necessary grade separations and approaches, sidetracks, switches, incidents and

appurtenances, in accordance with the plans and specifications annexed to the contract made and entered into September two, nineteen hundred twenty-six between the parties hereto and filed in the office of the secretary of state of the State of Michigan on September three, nineteen hundred twenty-six, which plans, specifications and blueprints are made a part hereof, except as herein modified or as they shall hereafter be modified as provided herein.

4.

That said railway company, upon the completion of its railroad upon said new right of way, shall remove its railroad tracks and equipment from the old right of way now occupied by it between the points herein designated, and the state, upon the removal of said tracks and equipment of said railway company by said railway company from said right of way, may at once take possession of the same and use and improve the same, including the railway company's present right of way through Birmingham, for highway purposes, and said railway company agrees to make, execute and deliver to the state all such deeds, releases and conveyances as shall or may be deemed necessary, requisite and proper to convey the same to the state, but there shall not be conveyed to the state, by the railway company any lands between said points other than its old right of way, and such parts of other lands owned by said railway company as shall be necessary to be acquired by the state to widen said Woodward avenue to a width of two hundred (200) feet.

5.

Upon the carrying out of this contract, and the removal of said railway tracks by said railway company from the old right of way to the new right of way, or the building

of new tracks on said new right of way by the railway company, and the payment to the State of Michigan by said railway company in full for the cost and expense incurred by the state under this contract, said railway company shall forthwith surrender its special charter and any and all rights which it now has or claims to have thereunder, and incorporate under the general laws of the state providing for the incorporation of railroad companies, and transfer any and all assets of said railway company as it exists under said special charter, together with all additions to and replacements of its property, to said railway company to be incorporated under the general laws of the state providing for the incorporation of railroad companies. That said railway company shall, upon the surrender of its special charter as above set forth, thereafter be assessed for taxes in the State of Michigan, without discrimination, under the general tax laws in force in said state, from time to time, providing for the taxation of the property of railroad companies.

6.

The deed or deeds of conveyance from the persons owning the lands to be acquired by the state for the new right of way of said railway company, shall be taken in the name of the State of Michigan, and when the state shall have acquired the title to all of said right of way and said railway company shall have completed the work to be by it done under this contract, the same shall be conveyed by the state to said railway company, and the governor of the State of Michigan is hereby authorized and empowered to make, execute and deliver said deed or deeds of conveyance on behalf of the state, the same to be attested by the secretary of state of the State of Michigan, and acknowledged by them and each of them under the great seal of the state.

7.

The railroad company shall repay to the State of Michigan all money advanced by the state, or the state highway commissioner, in acquiring the right of way for said railroad company and in paying said railroad company, in the first instance, for doing and performing the work and in furnishing the materials contracted by it to be performed and furnished at the times and in the amounts and in the manner following: On the thirty-first day of December, in the year that the state shall have acquired control of the new right of way herein provided to be procured, the railroad company shall pay to the state the sum of two hundred fifty thousand dollars, and on each succeeding thirty-first day of December thereafter the further sum of two hundred fifty thousand dollars: Provided, however, that when the actual cost of carrying out said contract in its entirety shall have been ascertained, then the railroad company shall pay to the state a sum equal to one fifteenth of said total actual cost, plus or minus the amount of over-payment or under-payment that shall have been made by said railroad company: And provided further, that said railroad company shall repay to the state all the money paid, laid out and expended under the terms and provisions of said agreement within fifteen years after the first payment by it made, as herein provided. It is expressly understood and agreed that no interest charge shall be made or accepted by the state on account thereof, except on past due installments, if any, and then at the rate of five per cent per annum.

8.

The state, acting through its state highway commissioner and with the assistance of the railway company,

agrees, at its entire initial expense, but to be fully repaid as hereinafter provided, to acquire by purchase, condemnation or otherwise a one hundred foot right of way, hereinafter referred to as the new right of way, together with such additional width as and where necessary to provide for proper cuts, fills and drainage for the proper development of said one hundred foot right of way for railroad purposes, between the aforesaid points, on the route designated on the blueprints, dated October four, nineteen hundred twenty-six, identified by the signature of the state highway commissioner and the chief engineer of the railway company, which are on file with the parties hereto and which are hereby made a part hereof, it being understood that the portion of the old right of way at or near said mile post thirteen, which lies within the new right of way, shall continue as part of the latter, and that the portion of the old right of way from said mile post twenty-two and one-tenth to mile post twenty-one and thirty-five one hundredths which lies within the new right of way, shall continue as part of the latter; also to likewise acquire the necessary additional land for station grounds at Birmingham, on the altered and relocated route, including that necessary for depot, freight house, team tracks, passing tracks, and other usual and necessary appurtenances such additional land to be four thousand feet in length and approximately three hundred feet in width, including said one hundred foot right of way, as indicated on said blueprints.

(a) It is understood and agreed that the acquisition of said new right of way and other lands shall be promptly commenced, prosecuted and completed, and that such acquisition shall be under the joint supervision of the state highway commissioner and the said railway company's chief engineer; they shall jointly appoint competent agent or agents to conduct the negotiations for

such right of way and other lands, and shall have full authority to fix the compensation of such agent or agents, and to discharge them at any time. No purchases shall be made except on the joint approval, in writing, of said state highway commissioner and chief engineer, and should either disapprove of the price of any proposed purchase, then the same shall not be concluded, but the land therein involved shall be acquired by condemnation. When condemnation is necessary, proceedings therefor shall be instituted and conducted in behalf of the state, by its proper officers, but with the right in the railway company, through its attorney or attorneys, and other representatives, to participate in such proceedings. All expenses involved in such acquisition, including detailed surveys and map work, therefor, shall be considered and treated as a part of the cost thereof, except that there shall not be included in such expenses any allowance for the services of the said state highway commissioner or chief engineer, or the attorneys for the parties.

(b) If the state highway commissioner, in the purchase of said new right of way and other lands, finds it expedient or necessary to purchase more land, adjacent to any part thereof, than may be actually required, it is understood and agreed that he may do so, provided such purchase shall be approved, in writing, by the said railway company's chief engineer. and that the cost of such additional land shall be considered and treated as part of the cost hereunder, and that the surplus land, either the whole or any part thereof, shall be disposed of on the best terms obtainable, at such time or times as the state highway commissioner and said chief engineer may deem expedient, if such disposition is prior to the making and delivery of the exchange deeds herein provided for, the state highway commissioner and said chief engineer to approve, in writing, each and every proposed disposition thereof, and

the net proceeds thereof shall be credited to the cost hereunder. If such disposition of any part of such surplus lands has not been made prior to such exchange deeds, then any remaining portion thereof shall be included in the deed to the railway company, and it shall thereafter be the sole owner thereof.

(c) Evidences of good, merchantable title to said new right of way, and other land, in the form of abstracts or otherwise, shall, from time to time, as said right of way and other land is acquired, be furnished by the state highway commissioner to the railway company, and the cost and expense thereof shall be deemed a part of the cost of said right of way.

9.

The railway company agrees, at the entire initial expense of the state, but to be fully repaid, as hereinafter provided, to itself do, or cause to be done by letting on contract to a contractor or contractors, all the work, including the furnishing of all materials for the grading of said new right of way, for a double track railroad, including all necessary drainage structures; also including the separating of the grades and crossing protection at the railroad crossings specified in general plans herein mentioned; also including the construction on said new right of way of a single track railroad, with necessary appurtenances, including construction on new right of way of telegraph pole lines and wires and other telegraph facilities of like kind as those now existing on old right of way; and also including facilities on new station grounds at Birmingham of like kind as those now existing on old station grounds, all on the grade and according to the general plans and specifications annexed to the contract dated September two, nineteen hundred twenty-six,

and filed in the office of the secretary of state, September third, nineteen hundred twenty-six; detailed plans and specifications to be prepared by the railway company as the work progresses, the expense thereof to be considered and treated as part of the cost of the work hereunder, all to be of the standard of first class for a modern railroad, not less than required by law; said work to be commenced and prosecuted with reasonable diligence after the new right of way has been acquired; Provided, that the railway company, at its option, may, before said new right of way has been fully acquired, commence and prosecute such work in any section where sufficient of the new right of way has been acquired to permit of expeditious and economical work.

(a) It is understood and agreed that the state highway commissioner, with the assistance of the railway company, shall procure any and all necessary public approval for the work to be done hereunder; and that the railway company, with the assistance of the state, shall procure any and all necessary approval from the interstate commerce commission for the abandonment of its old rights of way and relocation on its new right of way; and that any damages and/or expenses arising out of the carrying out of this contract shall be considered and treated as a part of the cost thereof.

(b) When the single track with appurtenances has been constructed as aforesaid, the railway company shall physically connect the same with its railroad at said mile posts thirteen and twenty-two and one-tenth, the expense thereof to be considered and treated as part of the cost of the work hereunder.

(c) It is understood that it shall be optional with the railway company to itself perform any or all of the work hereby provided for, or to let the same on contract to a

contractor or contractors. As to work which the railway company elects to let to a contractor, it shall procure proper bids of contractors, and will award the work to contractor or contractors at prices which shall first have been approved, in writing, by the state highway commissioner, and will make the necessary contract or contracts with the contractor or contractors, and pay for the work and materials by monthly estimates.

(d) It is understood and agreed that the railway company shall appoint a competent engineer to have general charge and supervision of the work herein provided for, both that performed by the railway company itself, and that performed by contractors, subject to the provisions hereof, and that he shall have authority to employ necessary assistants, including inspectors, and that the expense of such engineer, assistants and inspectors, including salaries or wages, field office, supplies, or any other items necessarily incident to said work, shall be considered and treated as a part of the cost of the work.

(e) It is understood and agreed that, as to work performed by the railway company itself, there shall be added to the cost of all materials furnished by its from stock to accomplish such work, fifteen per cent to cover the expenses of handling in transit, freight charges accruing on materials (the shipment of which originates on lines of railway companies comprising the Grand Trunk railway system), accounting, and other like overhead expenses which it is impracticable to allocate; it being understood that all other materials shipped for use in such work are to be purchased f. o. b. Royal Oak or Birmingham, for delivery at such place there as may be designated by the railway company, and said fifteen per cent shall not apply to any material so purchased.

(f) To the cost of all labor, performed by the railway company itself, including foremen, there shall be added ten per cent to cover the cost of accounting, use of small tools, and other like overhead expenses, which it is impracticable to allocate.

(g) It is further understood and agreed, that, as to work performed by contractors for the railway company and as to materials purchased f. o. b. Royal Oak or Birmingham, as aforesaid, there shall be added to the cost thereof, as fixed by contract, one per cent to cover the cost of advertising for bids, letting contracts, accounting, and other like overhead expenses which it is impracticable to allocate.

(h) It is further understood that the railway company will be required to furnish certain equipment for use in such work, and it is agreed that for equipment owned or controlled by it, or by companies comprising the Grand Trunk railway system, rental may be charged, and included in the cost of the work, such rental to be reasonable and according to the prevailing charges for like or similar purposes, and also other expenses contracted therewith, as well as the actual rental and other expenses paid for equipment leased from outside parties.

(i) The railway company shall monthly render to the state highway commissioner, acting for the state, bills covering the cost to it for the preceding month, including all expenditures made hereunder, which are chargeable to the cost of the work, whether for work by itself performed, or for work performed by contractors for it, according to estimates to be made by the railway company's chief engineer, the state highway commissioner or his representatives to have access to all the railway company's records pertaining to such work for the purpose of checking the same, and the state agrees to pay such

monthly bills within thirty days from the date of rendition; if not paid within thirty days after rendition, said bill or bills shall bear interest at the rate of five per cent per annum until paid; and said bills, together with accrued interest thereon, shall be deductible from the next succeeding annual payment or payments under paragraph seven hereof if not paid by the state before such payments become due; such accrued interest, if any, thus deducted shall not be considered and treated as a part of the cost of the work to be repaid by the railway company under said paragraph seven.

(j) When the construction aforesaid, including the furnishing of the materials, and also including the physical connection of said new single track with the railway company's railroad at mile posts thirteen and twenty-two and one-tenth, as aforesaid, is completed, the railway company shall promptly remove the physical materials, such as rails, ties, etc., from the old right of way, and the fair, net value thereof, with proper allowance for depreciation and expense of removal, as specified in the schedule annexed to the contract dated September second, nineteen hundred twenty-six, and filed in the office of the secretary of state, September third, nineteen hundred twenty-six, shall then be credited to, and deducted from, the total cost incurred by the state hereunder.

10.

This contract shall inure to and be binding upon the respective successors and assigns of the parties hereto, and in event said railway company consolidated with, leases or sells its railroad and other property to any other railroad company, whether of the Grand Trunk railway system, or otherwise, the rights, duties and obligations of the parties hereunder shall run with such railroad and

other property without loss or waiver thereby of any of the same, and the consolidated, purchasing or lessee railway company shall hold the same with all rights and obligations pertaining thereto hereunder, including the obligation and the right to make the payments herein specified without further responsibility for taxes in addition to the annual sum of twenty-five thousand one hundred seventy-one dollars and forty cents ($25,171.40) until the time shall have expired for the making of such payments in full to the state by said railway company, as herein specified; said railway company is not to obtain, however, an extension of the time herein specified, at which it is to come under the general railroad laws of the state for the purposes of taxation, nor be longer exempted from taxation under the general laws of the state providing for the taxation of railroad companies, by reason of any default in performance, or failure to pay, as herein provided, upon its part.

11.

Should any dispute arise between the parties hereto involving any matters herein it shall be submitted to a committee composed of the governor of the State of Michigan, the president of said railway company, and a third person, to be selected by them. In the event that the governor of the State of Michigan and the president of the Detroit, Grand Haven and Milwaukee Railway Company shall be unable to agree upon a third arbitrator, the then senior judge of the United States District Court, for the eastern district of Michigan, shall select such third arbitrator upon the written application of either party. Said committee shall fix a time and place of hearing giving reasonable notice to the parties, who shall have the right to introduce such evidence and arguments as may be deemed proper, and the decision of a majority of said

committee shall be final and conclusive as to the matter submitted to them. The expense of such arbitration shall be borne by the parties hereto equally, provided such committee may, in its discretion, otherwise apportion such expense.

If at any time after the execution, ratification and approval of this contract it shall be deemed necessary and advisable by the state to make additional grade separations along the line of said new right of way, in addition to the grade separations provided for in the plans and specifications herein referred to and made a part of this contract, said additional grade separations shall be made and the expense thereof be paid, as provided by the general laws of the State of Michigan governing the separation of grades at railroad crossings.

13.

The state reserves the right to change or relocate the new right of way herein specified, with the consent of the chief engineer of said railway company, but in the case of such change of location of new right of way, the grade thereof shall conform substantially to the grade herein referred to and provided for, and the cost of securing said right of way and of paying for the same, shall be ascertained, fixed and paid as herein provided, but nothing herein contained, if it may change the total amount to be paid, laid out and expended by the state, shall change, modify or extend the time within which said railway company shall pay and reimburse the state in full for any and all moneys paid, laid out and expended by it in carrying out and performing the terms and conditions of this contract, incumbent on its part to be carried out and performed by it.

14.

This contract and agreement shall not be binding until it shall have been ratified and approved by the legislature of the State of Michigan, signed on behalf of said state by the governor, attested by the secretary of state, under the great seal of the state, and signed by the state highway commissioner, and until the same shall have been executed on behalf of said railway company by its proper officers.

15.

The state, on the carrying out and fulfilling of this contract by the parties hereto, expressly abandons and fully relinquishes any right it has, or now claims to have, to purchase or otherwise acquire the railroad and/or other property of the railroad company, under the special charter or otherwise.

In Witness Whereof, The Parties hereto have caused this contract to be executed in quadruplicate, in their corporate names, by their respective duly authorized officials, this ..... day of ....., A. D. 1927.

STATE OF MICHIGAN,

By .....
Governor.

Attest: .....
Secretary of State.

.....
State Highway Commissioner.

DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY,

By .....
President.

Attest: .....
Secretary.

Act 215 of the Michigan Public Acts of 1925

An act to authorize and empower the state highway commissioner to purchase or condemn property to exchange for the right of way, or a part thereof, of railroads, and railways, when such right of way, or part thereof, is necessary to be acquired for widening, straightening, altering or otherwise improving a trunk line highway, and to make such exchange.

The People of the State of Michigan enact:

Section 1. Whenever the line of any railroad or railway company is upon or adjacent to the right of way of a trunk line highway and such right of way or any part thereof, is necessary to be acquired for widening, straightening, altering or otherwise improving such highway, the state highway commissioner shall be authorized to enter into negotiations with such railroad or railway company for the purchase of said right of way, or of any part thereof, and to enter into an agreement with any such railroad or railway company to exchange other designated property for such right of way, or for any part thereof, whenever such other designated property shall be acquired by him; and whenever any such agreement has been entered into, the said state highway commissioner shall be authorized and he is hereby empowered to acquire such other property by purchase or condemnation, and when acquired to execute the necessary conveyances and releases thereof to such railroad or railway company for its use, and to take in exchange therefor the railroad or railway right of way or part thereof for such public highway purposes in accordance with such agreement.

Sec. 2. The procedure that is, or may be, prescribed for condemnation proceedings instituted by boards of county

road commissioners or the procedure that is, or may be, provided for the condemnation by state agencies and public corporations of private property for the use or benefit of the public, is hereby expressly made applicable to any proceeding brought by the state highway commissioner under the provisions of this act.

Sec. 3. Whenever any property shall be acquired by the state highway commissioner under and by virtue of the provisions of this act, the consideration or compensation to be paid therefor shall be paid out of the state highway fund in five equal annual installments.

This act is ordered to take immediate effect.

Approved May 6, 1925.